Supreme Court, U.S.
FILED

(1)

No. 95 400 SEP 1 1 1995

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IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

DAVID NUMMER,
*Petitioner,*

v.

MICHIGAN DEPARTMENT OF TREASURY,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

# PETITION FOR WRIT OF CERTIORARI

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156 pp

## QUESTIONS PRESENTED

This Petition presents the following questions for review:

Whether the participation in a decision of the Michigan Supreme Court by a Justice whose term of office had not commenced as of the time the case was presented and argued, thus depriving Petitioner of oral argument before all the Justices who would decide the case, is a violation of the Equal Protection Clause of the Fourteenth Amendment, where the Justice in question did not participate in other cases which were also presented and argued prior to the date the Justice took office.

Whether giving collateral estoppel effect in civil rights cases to the administrative decisions of the Michigan Civil Service Commission, which has jurisdiction over the grievances of State employees in the Classified Civil Service only, is a violation of the Equal Protection Clause of the Fourteenth Amendment, where employees of private employers are permitted to pursue employer or union-sponsored grievance procedures without jeopardizing their right to recourse in the Circuit Court under the Michigan Elliott Larsen Civil Rights Act.

Whether giving collateral estoppel effect to Civil Service Commission decisions in civil rights cases unfairly discriminates against civil servants who have suffered **both** civil service and civil rights violations, in violation of the Equal Protection Clause of the Fourteenth Amendment, where those with both grievances (as opposed to those with one or the other) will be effectively forced either to forego their remedy for civil service

violations for fear that its resolution may preclude a later civil rights action, or pursue both claims before the Civil Service Commission, with the consequence of issue preclusion and only a limited right of appeal.

III

## LIST OF PARTIES

The Petitioner is David A. Nummer. The Michigan Department of Treasury, an agency of the State of Michigan, is the Respondent.

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No._____

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DAVID NUMMER,

*Petitioner*

v.

MICHIGAN DEPARTMENT OF TREASURY

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI**

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David A. Nummer petitions for a writ of certiorari to review the judgment of the Michigan Supreme Court.

## OPINIONS BELOW

The Opinion of the Michigan Supreme Court appears at 455 Mich. 934, 521 N.W.2d 15 (1995). The Decision of the Michigan Court of Appeals appears at 200 Mich. App. 695 (1993). The trial court and agency opinions [Appendix A-E] are not published.

## JURISDICTION

The Opinion of the Michigan Supreme Court was entered on May 2, 1995. (App. F, p.32a). The Supreme Court's Order denying the Petitioner David Nummer's Petition For Rehearing was entered on June 13, 1995. (App. G, p.42a). The text of that Order was amended by Order entered July 25, 1995. (App. H, p.107a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a), which provides, in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or treaties or statutes of, or any commission held or

authority exercised under, the United States.

The constitutional provision here involved is the Fourteenth Amendment which provides, in pertinent part:

> §1. **Citizenship rights not to be abridged by states**
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

This case arises out of race and gender discrimination in public employment. Petitioner David A. Nummer is a white male who was hired as an auditor by the Michigan Department of Treasury in 1970.

Petitioner remained in the Tax Fraud Division until 1987, when he and other Tax Fraud Division auditors were transferred to the newly formed Discovery Division within the Department of Treasury.

Petitioner objected to the transfer and filed a grievance with the Department of Civil Service. His grievance alleged two theories of recovery: 1) that the Department of Treasury breached a contractual promise that he would remain within the Tax Fraud Division, and 2) that the transfer constituted discrimination on the basis of race and gender in violation of the civil service provisions set forth in Article 11, Section 5 of the Michigan Constitution.[1] A fourth-step grievance hearing was held on March 7th and 8th, 1988.

The hearing officer reached the following decision with respect to Petitioner's grievance:

> The Department of Treasury's transfer of David A. Nummer from its Tax Fraud to its Discovery Division was based exclusively on business considerations. As such, the transfer did not violate either

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1 "No person shall be appointed to or promoted in the classified service who has not been certified by the commission as qualified for such appointment or promotion. No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations."

> the Merit Principles, section 1-1.1 or section 1-2.1 of the civil service rules. Therefore, the grievance is dismissed.

(App. A, p.13a). As to Petitioner's discrimination claims, the hearing officer stated:

> On the matter of discrimination, the claim is that auditors are white males and that most of the persons hired as regulation agents are from minority groups – women and persons of color. Grievant relies on this single fact to establish his claim. It is not sufficient to do so! The transfer was motivated by legitimate business considerations. I find that Grievant has not overcome this fact in his proofs. That the auditors were all men and that mostly women and other minorities replaced them is largely irrelevant because of the differing levels of the two classifications. In addition, the eligibility pool from which the regulation agents were selected was made up primarily of minority persons and this, not discrimination, is the reason for the staffing.

(App. A, p.12-13a). Petitioner sought judicial review of that decision in the Ingham County Circuit Court. Petitioner asserted that the hearing officer's decision was not supported by competent, material, and substantial evidence. On January 5, 1990, the Circuit Court, Michael G. Harrison presiding, affirmed the decision of the Civil Service Commission. (App. D, p.18a).

Just prior to the Circuit Court's decision,Petitioner filed a Complaint in the Ingham County Circuit Court, alleging breach of contract and race and sex discrimination in violation of the Michigan Elliott Larsen Civil Rights Act. (App. I, p.109a). In addition to his breach of contract claim, Petitioner alleged that the Respondent discriminated against him on the basis of race and sex by filling the "regulation agent" positions with minorities and women with no applicable education, experience, or training such as that possessed by Petitioner. (App. I, p.109a).

Respondent filed a Motion for Summary Disposition on the basis of M.C.R. 2.116 (C)(7). Respondent contended that the issues in this case were litigated before the Civil Service Commission and that Petitioner is collaterally estopped from litigating those issues in the Circuit Court. The trial court granted Respondent's motion on March 28, 1991. (App. E, p.29a).

Petitioner appealed the trial court's decision to the Michigan Court of Appeals. The Court of Appeals reversed and remanded as to Petitioner's race and sex discrimination claims under the Elliott Larsen Civil Rights Act. Nummer v. Dept. of Treasury, 200 Mich. App. 695 (1993). The Court of Appeals held that the doctrine of collateral estoppel does not preclude the Petitioner from bringing his race and sex discrimination claims in Circuit Court, despite the fact that Petitioner litigated the issues before the Civil Service Commission whose final decision was affirmed by the Circuit Court.

In reaching its conclusion, the court held that the Legislature has provided that a civil action for the redress of civil rights violations may be pursued **in addition to**

the administrative machinery provided by statute. A plaintiff whose civil rights claim is denied by the Civil Service Commission may file an original action in Circuit Court, which may conclude otherwise and may further award injunctive relief and/or damages, including costs and a reasonable attorney's fee. Accordingly, the Court of Appeals held that an adverse Civil Service Commission ruling does not have collateral estoppel effect in a subsequent civil rights action, even where the Circuit Court has affirmed the Civil Service Commission ruling.

Respondent applied for leave to appeal to the Michigan Supreme Court, which leave was granted on June 29, 1994. Oral arguments were heard before that Court on November 2, 1994. Petitioner, Plaintiff-Appellee in the Lower Court, argued among other things that since private plaintiffs are permitted to pursue cumulative and overlapping remedies in civil rights cases, those in the classified civil service, who choose to utilize their employer's internal grievance procedure, should be entitled to the same range of remedies. [2]

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> "Third, we do offer private plaintiffs the opportunity to pursue cumulative and overlapping remedies in the civil rights area. Those in the classified Civil Service, who chose to go through their employer's internal grievance procedure should be entitled to the same range of remedies.
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> But multiple findings and results are typically permitted in the field of civil rights.
>
> * * *

On May 2, 1995, the Michigan Supreme Court issued a decision reversing the decision of the Michigan Court of Appeals, holding that Petitioner is barred by the doctrine of collateral estoppel from litigating his civil rights claims in the Circuit Court. In an Opinion by Justice Riley, the majority reasoned that the language of the Michigan Elliott-Larsen Civil Rights Act simply contemplates an appeal from the Civil Rights Commission, but does not contemplate a new, original action in circuit court, and that the same should be true for claims first beginning in the Civil Service Commission. The majority further reasoned that the legislature has provided only one remedy from an adverse

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Because of Gardner-Denver decision, in the state cases which have adopted that same rationale, private employees are permitted to complete their employers internal grievance procedure, then they are permitted to proceed to the Department of Civil Rights, if they so choose, and then perhaps also – certainly to the circuit court on a full review, and perhaps also to the circuit court with a separate civil action under the Civil Rights Act. State employees who have opted to be represented by a collective bargaining agent, also are not held to the decisions that are made by their bargained-for grievance bodies. It would be anomalous to give Civil Service employees fewer remedies than we give to private employees, and to other state employees as well. Especially since the Constitution, and the Court of Appeals, and the legislature, and this Court have given every intent to place Civil Service employees on an equal footing with other employees, private employees, and other public employees as well, in the area of civil rights. Therefore, Civil Service employees should be permitted to pursue multiple remedies even if they do yield inconsistent results." [Transcript of November 2, 1994 at pp. 13, 16, 17]

determination – direct appeal to the circuit court.

The decision of the Michigan Supreme Court was reached by a vote of four (4) justices to three (3) justices. Justice Riley wrote the opinion of the Court, joined by Chief Justice Brickley, Justice Boyle and Justice Weaver. Justice Mallett, joined by Justice Cavanagh, dissented. Justice Levin, in a separate opinion, concluded that he would not apply the doctrine of collateral estoppel under the facts of this case.

The fourth and deciding vote in favor of reversal was cast by Justice Elizabeth A. Weaver. Justice Weaver took office on January 1, 1995, approximately two months **after** oral argument in this case took place. Since January 1 of 1995 and until May 2, 1995, the Michigan Supreme Court issued at least twelve (12) decisions in cases in which oral arguments were held prior to the time Justice Weaver took office.[3] Of the decisions issued during this time period, and in which oral arguments were held prior to the time Justice Weaver took office,

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[3] People v. Fields, 448 Mich. 58, 528 N.W.2d 176 (1995); Turner v. Auto Club Insurance Association, 448 Mich. 22, 528 N.W.2d 681 (1995); Bahr v. Harper-Grace Hospital, 448 Mich. 135, 528 N.W.2d 170 (1995); Gross v. General Motors Corporation, 448 Mich. 147, 528 N.W.2d 707 (1995); Chrysler Corp v. Skyline Industrial Services, Inc., 448 Mich. 113, 528 N.W.2d 698 (1995); People v. Reeves, 448 Mich. 1, 528 N.W.2d 160 (1995); Arco Industries Corporation v. American Motorists Insurance Company, 445 Mich. 880, 519 N.W.2d 887 (1995); People v. Bahoda, 448 Mich. 261, 531 N.W.2d 659 (1995); Phillips v. Butterball Farms Company, Inc., 445 Mich. 934, 521 N.W.2d 15 (1995); Citizens Insurance Company of America v. Federated Mutual Insurance Company, 445 Mich. 882, 519 N.W.2d 888 (1995); People v. Houston, 448 Mich. 312, 532 N.W.2d 508 (1995); Nummer v. Treasury Department, 455 Mich. 934, 521 N.W.2d 15 (1995).

Justice Weaver participated in only two.[4]

Petitioner asked the Michigan Supreme Court to grant a rehearing or reconsideration of its decision and to resolve the appeal without the participation of Justice Weaver. In the alternative, Petitioner asked the Court to grant reargument before the entire Court, including Justice Weaver. Petitioner argued, among other things, that the participation of Justice Weaver in this decision, argued prior to her term, violated his right to equal protection of the laws.

The Michigan Supreme Court denied Petitioner's Motion on June 13, 1995. (App. G, p.42a). The Court issued an amendment to that Order on July 25, 1995, which amendment noted the dissent of Justices Levin, Cavanagh and Mallett to the decision denying rehearing. (App. H, p.107a).

## ARGUMENT

**1. The participation in a decision of the Michigan Supreme Court by a Justice whose term of office had not commenced as of the time the case was presented and argued, thus depriving Petitioner of oral argument before all the Justices who would decide the case, is a violation of the Equal Protection Clause of the Fourteenth Amendment, where the Justice in question did not participate in other cases which were also**

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[4] People v. Houston, 448 Mich. 312, 532 N.W.2d 508 (1995); Nummer v. Treasury Department, 455 Mich. 934, 521 N.W.2d 15 (1995).

**presented and argued prior to the date the Justice took office.**

Oral argument on appeal, whether it constitutes a right, an entitlement, or a privilege, may not be denied selectively, in violation of the Equal Protection Clause of the Fourteenth Amendment. Litigants before the Michigan Supreme Court are entitled to oral argument if they so advise the clerk. M.C.R. 7.312. Once a request is made, oral argument is not denied without further order of the Court. Id. Oral argument is sufficiently critical to the disposition of a case that the Rules provide that, in cases which have not been decided at the end of the term (September 30th of each year), the clerk **shall** schedule the case for reargument at the request of either party. M.C.R. 7.312(E). The Michigan Supreme Court has further acknowledged the importance of the interaction between Counsel and the Justices which occurs at oral argument by stating that "the Court looks with disfavor on an argument that is read from a prepared text." M.C.R. 7.315.

Petitioner here was not permitted oral argument before Justice Weaver, who participated in the decision but whose term of office had not commenced at the time of oral argument. Other litigants whose cases were argued prior to January 1, 1995, and in whose decisions Justice Weaver did **not** participate), had the opportunity to argue their appeals before the Justices who would decide their cases. Of the class of cases argued prior to Justice Weaver taking office, and in which decisions were pending at the commencement of her term, Justice Weaver participated in only two between January and May of 1995. Thus, Justice Weaver did **not** participate in at least ten other decisions, all of which were argued prior to her term.

Permitting a justice, whose term of office had not commenced at the time the case was heard, to participate in the decision of the case deprives the Petitioner of his right of appeal – the right to argue his case before the Justices who would decide his case. Moreover, Petitioner has been singled out for that deprivation because similarly situated litigants (whose cases were also argued prior to the commencement of Justice Weaver's term) were permitted to argue their case before all the Justices who would take part in their decisions.

This Court has held that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review. E.G. Griffin v. Illinois, 351 U.S. 12, 18 (1956). Nevertheless, this Court has also held that when an appeal is afforded, " . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." Lindsey v. Normet, 405 U.S. 56 (1971). The selective participation of Justice Weaver in certain of the cases argued before she took office – but not in most others – denies Petitioner a full appeal and deprives him of his right to equal protection of the laws under the Fourteenth Amendment.

This Court addressed the relationship between the right of appeal and the Equal Protection Clause in Lindsey v. Normet, 405 U.S. 56 (1971). At issue in Lindsey was the constitutionality of an Oregon Statute that required tenants challenging eviction proceedings to post a bond of twice the amount of rent expected to accrue pending review on appeal. The statutorily-imposed bond was forfeited to the landlord if the lower court decision was affirmed.

This Court held that the double-bond requirement in Lindsey violated the Equal Protection Clause. In reaching its conclusion, this Court held that the requirement was "unrelated to actual rent accrued or to specific damage sustained by the landlord." 405 U.S., at 77. Furthermore, the requirement burdened only tenants and established "a substantial barrier to appeal faced by no other civil litigant in Oregon." Id. at 79. The Court thus concluded that the requirement bore no reasonable relationship to any valid state objective and that it discriminated against the class of tenants appealing from adverse decisions in wrongful eviction cases in an arbitrary manner. Id., at 76-77, 79.

The procedure here in question, like the statute in Lindsey, singles out a very narrow class of litigants for discriminatory treatment in an arbitrary and irrational fashion. Petitioner is one of only two losing litigants in the first five months of Justice Weaver's term to be denied oral argument before all the Justices who would decide his case. This case is even more egregious than Lindsey because there is no reason given for the unprecedented participation of Justice Weaver in this decision. Thus, as in Lindsey, there can be no rational connection between the objective of Justice Weaver's participation (whatever that objective might be) and the Court's choice to impose that participation only upon Petitioner and one other litigant.

Even under the most deferential standard of equal protection review, there must be a rational basis for deciding that some litigants receive oral argument before all the Justices who will decide their case, while others do not. See, Moore v. Spangler, 401 Mich. 360, 258 N.W.2d 34 (1977). In this case, no reason was given for the radical departure from past practice. Justice Weaver did

not participate at the Court of Appeals level in any of the ten cases in which she did not participate during the period in question, and there are no other reasons on the face of the opinions which indicate why she did or did not participate. Notably, three Justices dissented from the denial of the Petitioner's Motion for rehearing.

There is no rational basis for the selective participation of a Justice of a State Supreme Court in some cases argued before her term but not in others argued before her term. In fact there is no authority, either express or implied, for a Justice of the Michigan Supreme Court to participate at all in decisions in cases which were argued before his or her term began. To the contrary, the exclusive practice has been that a justice who does not participate in oral argument of a case does not participate in the final decision unless reargument is ordered.

This practice has been recognized in explicit and implicit statements made by the Michigan Supreme Court. In Morse v. Hayes, 150 Mich. 597, 114 N.W. 397, 399 (1908), the Court recognized that a justice who does not participate in oral argument of a case does not and should not participate in the final decision unless reargument is ordered.[5] Earlier, in Jagger v. Coon, 5

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5 "In considering this case, **the five justices who listened to the argument, and who therefore must determine it**, all agreed that before overruling Stringer v. Stephens' Estate, the case should be reargued before the full bench, if that course was desired by any of the three justices not participating in this decision."

Mich. 31, 32 (1858), the Court granted reargument of a case on the basis that "where less than a quorum of the Court has heard the argument, there is no authority to render judgment." Similarly, in Attorney General v. Riley, 417 Mich. 119, 332 N.W.2d 353 (1983), Justice Levin implicitly recognized that justices do not participate in decisions argued before he or she takes office.[6] Finally, in Hickey v. Zekulka, 439 Mich. 408, 420 487 N.W.2d 106; (1992), the Court entered an order before permitting Justice Mallett to participate in reargument and

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Morse v. Hayes, 150 Mich. 597, 114 N.W. 397, 399 (1908) (emphasis added).

[6] At issue in Attorney General v. Riley, 417 Mich. 119, 332 N.W.2d 353 (1983) was the issue of short-term appointment of justices:

> "As a practical matter, **because of the time that ordinarily elapses between argument of a case and its decision,** there is little a Governor's appointee to this Court can do in the relatively short time between an appointment after a November election and January 1.
>
> * * *
>
> Moreover, it is again relevant that it is unlikely that a vacancy will occur so far in advance of January 1 that the judge appointed would be able to perform much in judicial duties between the effective date of his appointment and January 1. It is most unlikely that a person appointed to the Court of Appeals or the Supreme Court would both **hear a case and file an opinion in less than two months.**" Id. at 208-209 n.7 (emphasis added).

resubmission of a case that had been first argued before he took office. Yet the Court in this case permitted Justice Weaver to participate in the decision of a case without reargument, and without any corresponding order or authority.

Justice Weaver's participation in the decision below serves **none** of the purposes of other restrictions upon the right of appeal that have been recognized by this Court as legitimate. It is neither an attempt to deter frivolous appeals nor to conserve judicial resources. In fact the practice in question will have no effect upon the costs of litigation or the conservation of judicial resources, and instead penalizes litigants without notice and after the appeal has taken place and arguments held.

If Justice Weaver participation were limited to cases in which the Court was otherwise evenly divided, her participation does not effectuate any purpose in that regard. The Michigan Supreme Court has a practice and procedure for disposing of cases in which the Court is divided – affirmance by an equally divided court, or reargument of the case.[7] There is no legitimate purpose for "breaking a tie" with a vote by a Justice not in office at the time the case was heard.

The Michigan Supreme Court made an arbitrary and capricious selection of those cases which are to be

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[7] M.C.R. 7.316(c) provides, in pertinent part:

> ". . . Except for affirmance by action of a Lower Court or Tribunal by even division of the Justices, a decision of the Supreme Court must be made by concurrence of a majority of the Justices voting."

decided solely by those justices who participated in oral argument, and those cases in which Justice Weaver was invited to participate despite her absence from the bench at the time of the argument. Given the availability of affirmance by even division, as well as the power of the Court to order reargument, her participation is in no way necessary to reach a decision in the case. Justice Weaver's participation in this case, and not in others, remains completely unexplained, and is not even declared to be an exercise of proper discretion. Thus the Plaintiff has been deprived of equal protection of the laws even under a rational basis test.

But for the Court's unprecedented action in this case – permitting Justice Weaver to participate in the decision **after** oral argument – the decision of the Court of Appeals would have been affirmed and Petitioner would have had the opportunity of a trial on the merits of his civil rights claims. As a consequence of the irregularity, Petitioner has been deprived of the right to argue his case before the deciding Justices, as well as his substantive rights to obtain a higher position in public employment, and to be compensated for the State's refusal to promote him on the basis of race and sex.

By accepting this Petition, this Court will resolve an important question of federal constitutional law regarding the ability of a Justice whose term has just commenced to take part in decisions argued before his or her term began. To Petitioner's knowledge, only one State Supreme Court has addressed a similar practice, and has found that it is a violation of state constitutional

law and policy.[8]

The selective participation of a Justice of the highest Court of a State in decisions argued before her term began – and without explanation – opens the door to the politicization of the highest Court of a State. It has violated Petitioner's right to equal protection of the laws and should not be tolerated by this Court. Petitioner is asking for reversal of the decision of the Michigan Supreme Court denying his Motion for Rehearing or for reargument before all the Justices empowered to decide the case.

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[8] Moles v. Regents of University of California, 654 P.2d 740, 32 Cal. 3d 867 (1982):

> "This right to oral argument would be an empty right indeed if it did not encompass the right to have one's case decided by the justices who heard the argument.
>
> * * *
>
> No proof of the value of oral argument is more compelling, however, "than the fact that many judges find that the opportunity for a personal exchange with counsel makes a difference in result." [citation omitted] This aspect of oral argument – the chance to make a difference in result – is extremely valuable to litigants. If oral argument is to be more than an empty ritual, it must provide the litigants with an opportunity to persuade those who will actually decide an appeal. Clearly, oral argument cannot provide this opportunity if the judges who hear the argument are not the ones who decide the case. If "those who hear" are not "those who decide," oral argument is meaningless, and the right to oral argument is no right at all."

**2. Giving collateral estoppel effect in Michigan State civil rights cases to the administrative decisions of the Michigan Civil Service Commission, which has jurisdiction over the grievances of State employees in the Classified Civil Service only, is a violation of the Equal Protection Clause of the Fourteenth Amendment.**

Following this Court's decision in Alexander v. Gardner-Denver, 415 U.S. 36 (1974) and decisions of the Michigan Supreme Court which have adopted its ruling,[9] the employees of private employers in Michigan are permitted to pursue internal grievance procedures without jeopardizing their right to recourse to the Circuit Court under the Michigan Elliott Larsen Civil Rights Act. Those employees may pursue and complete internal grievance procedures and then proceed to the Department of Civil Rights, with full *de novo* review by the Circuit Court. Those employees are further permitted to obtain relief in the Circuit Court under the Michigan Elliott Larsen Civil Rights Act. Similarly, non-Civil Service State employees, as well as Civil Service employees who have opted to be represented by a collective bargaining agent, may pursue and complete their bargained-for grievance procedures, proceed to the Department of Civil Rights, with full *de novo* review by the Circuit Court, and then obtain relief in the Circuit Court under the Civil Rights Act.

State employees in the classified civil service who grieve to the Michigan Civil Service Commission are like private employees (or other state employees) who grieve

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[9] Wilson v. Acacia Park Cemetery Assn., 162 Mich. App. 638, 413 N.W.2d 79 (1987); Michigan Civil Rights Commission v. Chrysler, 64 Mich. App. 393 (1975).

to an employer- or union-sponsored arbiter of disputes. The Civil Service Commission has no jurisdiction over the employment grievances of any persons except those in the classified civil service, and its grievance procedure is thus the equivalent of an employer's internal grievance procedure. Nevertheless, under the Michigan Supreme Court's decision in this case, State employees in the classified civil service who wish to pursue civil rights violations – unlike their counterparts in private employment – must now elect a remedy. They must either proceed before the Michigan Civil Service Commission, **or** proceed before the Michigan Department of Civil Rights and/or the Circuit Court under the Civil Rights Act. Such an employee does not share the remedies available to his or her counterpart in private employment, for reason that an adverse ruling by the Civil Service Commission – from which there is only a limited right of review – will preclude a subsequent action in Circuit Court.

This dichotomy is without a rational basis, and in fact runs counter to Michigan constitutional and statutory law and the decisions interpreting that law. In that regard, it has been the policy of the Michigan Supreme Court, the Michigan Court of Appeals, and the Michigan Legislature to place civil service employees on an equal footing with private employees with regard to the enforcement of their civil rights. The anti-discrimination provisions in the constitution extend civil rights protection to "all persons", and do not exclude those in the classified civil service.[10] The Elliott Larsen Civil Rights Act defines the "State" as an "employer", and does not exclude from its protection those in the classified civil

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[10] Michigan Const. Art. 1 Section 2.

service.[11] The Michigan Court of Appeals as well has recognized that civil service employees have just as great a need for access to the courts as do private employees, and does not require civil service employees to exhaust administrative remedies in civil rights cases.[12]

Counsel for Respondent here in fact admitted on oral argument that the State is treating Civil Service employees differently with respect to the enforcement of their civil rights:

JUSTICE BOYLE:

> What do you do with sort of a lingering equal protection ring to the fact that state employees then will not have as many opportunities to question these employment decisions as private employees?

MR. SZCZUBELEK:

> I think that as the Constitution provides, the classified civil service is a separate area of employment. The Constitution provides that they should be more heavily regulated than the private sector. **The whole idea is to keep them distinct from other employees.**

[Transcript of November 2, 1994, at pp. 22-23 (emphasis added)]. True as this statement may be, it is directly

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[11] MCL 37.2103(f); MCL 37.2201(a).

[12] Walters v. Department of Treasury, 148 Mich. App. 809, 385 N.W.2d 695 (1986)

contrary to the legislative and case authorities cited above, which demonstrate a clear intent to give public employees in general, and Civil Service employees in particular, every opportunity to enforce their civil rights that is available to private employees.

It is true that a State may set up classifications based upon distinctions, and assign to each class a different burden so long as those divisions and burdens are reasonable. And "[i]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910).

The distinctions between this narrow class of Civil Service employees, and private employees, other public employees, and Civil Service Employees who are union-represented, is not only capricious and arbitrary, but is contrary to the Michigan Constitution, the Elliott-Larsen Civil Rights Act, and the interpretive caselaw. Such a classification cannot be reconciled with the Equal Protection Clause of the Fourteenth Amendment. See Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia, 488 U.S. 336 (1988).

Employees of private employers (and most public employees as well) are permitted to pursue multiple remedies in civil rights cases, even if they yield inconsistent results. To distinguish those in the classified civil service is without a rational basis and is prohibited by the equal protection clause of the Fourteenth Amendment. The decision of the Michigan Supreme Court should thus be reversed.

**3. Giving collateral estoppel effect to Civil Service Commission decisions in civil rights cases unfairly discriminates against civil servants who have suffered both civil service and civil rights grievances, in violation of the Equal Protection Clause of the Fourteenth Amendment.**

The decision of the Michigan Supreme Court in this case will cause civil servants who have both civil service grievances and civil rights claims to split their causes of action. As Justice Levin pointed out in his separate opinion below, Petitioner could not have obtained an adjudication of all of his claims in a Circuit Court action. Civil service employees are required to bring their claims for violations of the civil service rules before the administrative tribunal as provided in the Michigan Constitution, followed by an appeal to the Circuit Court under the substantial evidence standard. They cannot, in a Circuit Court action asserting that their civil rights have been violated, join claims seeking redress for the violation of their civil service rights.

Since civil service employees will generally consider themselves more likely to prevail on a civil rights claim in circuit court, such employees – in light of the decision of the Michigan Supreme Court in this case – will split their claims. Civil rights claims will be brought in circuit court, and non-civil rights grievances will be heard, as they must, before the Civil Service Commission. This will result in precisely the multiplicity of litigation the doctrine of collateral estoppel is designed to reduce.

The splitting of claims that will necessarily follow the decision below unfairly discriminates against those in the classified civil service such as Petitioner, who have both civil rights and non-civil rights claims. In the Civil

Service Commission, the hearing officer's findings on the noncivil rights grievance may decide factual issues central to a circuit court civil rights action. Where that might occur, a civil servant would likely choose to forgo his noncivil rights claims altogether in order to protect his civil rights claim against an adverse finding by a Civil Service Commission hearing officer regarding an issue central to a circuit court civil rights action.

Petitioner here has been and would be deprived of a remedy no matter what choice he made with respect to the forums available to him. Under the Michigan Supreme Court's ruling, Petitionier's circuit court civil rights claim was precluded by the adverse finding of the Civil Service Commission. Even if Petitioner had made the choice to split his claims (to bring his civil rights action in the circuit court and his non-civil rights claim before the Civil Service Commission) – seemingly the only avenue of protection available under the Court's ruling – his circuit court civil rights action could nevertheless have been barred by collateral estoppel.

In that regard, the Civil Service Commission's finding that Petitioner's transfer was based "exclusively on legitimate business considerations" (App. A, p.13a) could preclude relitigation of the reasons for his transfer. Thus Petitioner could not have avoided the consequences of issue preclusion by electing to bring his civil rights claim only in the circuit court. Petitioner would have been in a better position, given the Michigan Supreme Court's ruling in his case, had he foregone complaining of civil service violations altogether – a result surely not intended by the framers of the Michigan Constitution.

This result unfairly discriminates against a narrow class of civil service employees, those with multiple claims

involving civil rights claims and overlapping issues. As Justice Levin observed:

> A state civil servant who has both a civil rights grievance and a noncivil rights grievance should be able to seek a Civil Service Commission hearing of his noncivil rights grievance without running the risk that the decision of that claim will preclude a circuit court civil rights claim even if the employee does not file a grievance regarding his civil service discrimination claim.

533 N.W.2d at 268 (Opinion of Justice Levin).

Petitioner and those civil service employees with civil service and non-civil service claims, have thus been singled out and treated less favorably by the lower court's application of the rules of issue preclusion. A civil service employee who has **either** a civil rights claim or a non-civil rights claim may proceed, even after the Michigan Supreme Court's decision, before either the circuit court (with the civil rights claim) or the Civil Service Commission (for the non-civil rights claim). The rules of issue preclusion, other than forcing him to litigate his civil rights claim **only** in the circuit court, will not have a deleterious effect on the processing of his claim.

The application of the rules of issue preclusion set forth in this case bears no rational connection to the objective of the doctrine of collateral estoppel – to discourage multiplicity of actions. Instead, the Court's ruling will do just that – result in civil servants splitting their causes of action. Even if they split their claims, those like Petitioner with multiple claims and overlapping issues run the risk that an adverse finding on the non-civil rights claim will preclude issues critical to their civil rights

claim. Their only "protection" would be to withhold the grievance concerning their non-civil rights (civil service) violations, a right which has been provided for them in the Michigan Constitution.

This distinction between civil servants with civil rights and non-civil rights grievances, and those with one or the other, for purposes of applying the doctrines of issue preclusion, violates the Equal Protection Clause of the Fourteenth Amendment and should not be tolerated by this Court.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
GREEN & GREEN

By: /s/Christine A. Green (P38413)
Attorney for Petitioner

DATE: September 9, 1995

## APPENDIX A

**State of Michigan**
**DEPARTMENT OF CIVIL SERVICE**

**Hearings Division**

**A GRIEVANCE DECISION**

Mailing Date:
June 17, 1988

DAVID A. NUMMER

and

DEPARTMENT OF TREASURY

HO 039-88

Docket No. 13412

C Assignment
2 Prohibited Discrimination
4 Policy Application
5 Condition of Employment

Hearing Officer

Donald F. Sugerman
Hearing Officer Ad Hoc Panel
Hearings Division

Hearings Reporter

Kay Winslow, Winslow Court Reporting

APPEARANCES

| Employee | Employer |
| --- | --- |
| Brandon W. Zuk, Esq. of Fraser Trebilcock Davis & Foster, P.C. | Lamont M. Walton, Asst. Attorney General |

A fourth-step grievance hearing was held on March 7 and 8, 1988, at the Department of Civil Service Labor Relations Center, 608 South Washington Avenue, Lansing, Michigan.

At the conclusion of the evidentiary hearing, counsel for the parties agreed to submit their closing arguments in letter form. They each filed such a letter on March 25, 1988 (received March 29, 1988), in which the issues, positions, and arguments were comprehensively and ably addressed.

## THE ISSUES

The issues set forth in the notice of hearing read as follows:

> Was Grievant's transfer to the Discovery Division in violation of a condition of employment, past practice, or Civil Service Rules?

Frequently the issues actually presented differ somewhat from those contained in the grievance and notice of hearing. This case falls into that category. A more precise description of the issues is set forth below:

1. Did the transfer of the grievant violate an enforceable promise – made by Department officials – that he would continue in the Tax Fraud Division in a combined position of investigator and auditor?

2. Did the Department violate Civil Service Merit Principle No. 1 and Rules 1-1.1, and 1-2.1 by transferring grievant from the Tax Fraud Division to the Discovery Division?

3. Was the grievant transferred because he is a white male and thus in violation prohibitions against race and sex discrimination?

## BACKGROUND

In 1970, the grievant, David Nummer, graduated from Ferris State College with a bachelor of science degree in accounting and went to work for the Michigan Department of Treasury (Department) as an auditor. The record is silent concerning the work he performed from 1970 to 1978, but presumably it was tasks ordinarily associated with the auditor classification. In 1978, Nummer was assigned to the Intelligence Unit. In 1980, this unit was combined with two other operations (Detroit Inspector and Cigarette Tax Crew) and became known as the Special Investigation Division (SID), later

changed to the Tax Fraud Division (TFD).[1] Nummer worked in the TFD until January 1987, when he was transferred.

The two classifications of TFD employees involved in this case are auditor and criminal investigator. Because of the qualifications and duties involved in the positions, auditors are considered professional employees and investigators are not. Be that as it may, employees in these classifications performed similar tasks and the lines of demarcation between them became blurred. For example, in a position description prepared in 1980, Nummer estimated that he spent 50% of his work time doing audits and 50% doing investigations. (Grievant Exhibit 2).

Auditing, of course, is a form of investigation, but fully half of the work Nummer was doing was criminal investigations. In this regard, he made "buys" of contraband, engaged in surveillance, recorded conversations with suspected criminals by wearing a "wire," and assisted law enforcement officers to obtain warrants and to execute on them (through raids). The records, evidence, and information gathered through these investigations were audited by Nummer (or sometimes by others under his direction) to determine whether the suspects owed State taxes and, if so, to build a criminal case against them.

How and why the duties of auditors became intertwined with those of criminal investigators in unclear. But it is undisputed that as a result of this new

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[1] For convenience, "TFD" will be used to refer to both SID and TFD.

role, an auditor in TFD functioned in a manner quite unlike his or her counterpart in other divisions. The TFD auditor was a hybrid position and that of the criminal investigator was too. Auditors performed the full range of criminal investigator functions, but the reverse as not true; investigators did only routine and simple audits.

This interchange led the administrator of TFD to recommend to the Commissioner of Revenue that the Department seek to have Civil Service establish a single classification encompassing auditors and investigators and provide them with a career track for advancement. (Dept. Exs. 1, 2, 3). From 1980 to the beginning of 1985, representatives of TFD repeatedly tried to secure approval for a combined classification of auditor and investigator. For one reason or another, they were unsuccessful. In the meantime, the business of the division went on as before. This however, was not to continue!

In February 1985, Susan Work Martin became the Commissioner of Revenue. One of her initial projects was to review the operations of TFD generally and the performance of auditors and investigators specifically. Martin read all of the material on the subject of tax fraud administration. She visited the auditors and investigators and had them explain, in detail, how they performed their duties. A comprehensive assessment led Martin to conclude that supervision of auditors and investigators was inadequate. Some employees were located a considerable distance from their immediate supervisors making any oversight, at best, minimal. This situation meant that efficiency and effectiveness of the operation was not being measured. Indeed, employees seemed to

be functioning almost independently of the department.[2] Martin took immediate steps to correct what she perceived as weaknesses in the TFD system.[3]

In spite of the above changes, Martin supported her predecessors' efforts to establish a combined classification, reasoning that neither auditors nor investigators were working within their designated categories. Her actions bore fruit and Civil Service gave its approval for the Department to combine the jobs into the classification of "Regulation Agent." Before Nummer could become the beneficiary of this change, he was transferred to an auditor position in a newly-created division of "Discovery" within the Department. The Discovery Division, was established to recover taxes through the use of computer technology. Nummer's principal argument is that the transfer violates promises made to him that he would continue in the combined classification in TFD. He also asserts that the transfer violates various Civil Service Rules. These contentions

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[2] For example, Nummer's work station was in Lowell (on the western side of the State) and his supervisor was in Detroit. This translated into sporadic and limited oversight. More importantly, no one seemed to control assignments. While some cases were assigned, most of Nummer's cases came from leads given to him by "contacts" that he had developed. Under this procedure, Nummer, in effect, determined which cases he would handle, the amount of time that would be spent on each case, his hours of work, and the manner in which the investigation was to be conducted. This recitation is not meant to suggest that Nummer was deficient in performing his job or that he was doing it improperly. It merely points out the situation that Martin discovered and that she believed needed correction.

[3] It is unnecessary in this decision to detail the corrective action taken by Martin. She imposed immediate and stringent controls to ensure efficiency of operations.

will be discussed below.

## DISCUSSION

1. Did the transfer of the grievant violate an enforceable promise – made by Department officials – that he would continue in the Tax Fraud Division in a combined position of investigator and auditor?

The Grievant alleges that he was told repeatedly by his immediate superiors that he would continue performing criminal investigations. These statements are the basis for his claim that he was promised employment and a career path in TFD. On cross examination, Nummer stated that these promises were memorialized in a series of memoranda. He produced copies of these documents and they were admitted into evidence as Department Exhibits 1, 2, and 3.

The aforesaid exhibits establish a fact not disputed: For several years, the Administrator of TFD, Henry Kramer, persisted in trying to have the positions of criminal investigator and auditor combined into a single classification. He wrote numerous memoranda to his superiors in support of the combined position. For example, in 1982, he wrote to the then Commissioner, Sydney Goodman, that:

> Implementation will provide equal pay levels, a career promotional ladder, levels of required supervision, required skills to perform duties, the means and proper procedures to accomplish assignments and the experience of seeing [TFD] purpose accomplished. (Dept. Ex. 2).

Nothing in any of the documents, however, even remotely resembles a promise or a guarantee that employees would continue to work in TFD. At the very most, they express the goal of the ten administration to seek a combining of the positions.

Even if the statements made to Nummer could somehow be construed as an express or implied promise of employment, I would nevertheless be constrained to reject the argument that they were viable in 1986. First, the "promise" was only that a single classification would be sought. Second, such promises would appear to be in contravention of the Civil Service Rules. Third, if the persons promised (or guaranteed) Nummer that he would be placed into the combined classification and remain in TFD – even assuming that they had the authority to make such promises – it would only be binding on the promisors and not their successors in office. For that reason, the promises expired when the officials who made them were unable to secure the combined position on which it was based during their tenure in office.

In 1985, Martin imposed stringent requirements on case assignments and handling by auditors and criminal investigators. And she informed the staff that a review would be made to determine whether the TFD should continue in operation. After an investigation, including a review of how other states and the federal government handle the matter of tax fraud, Martin decided that the unit should be continued. In addition, she supported the proposal to combine the auditor/investigator classifications. But Martin's reasoning on this latter item was quite different from that of her predecessor: She felt they should be combined because the occupants were not working within their

described classifications. I credit Martin who testified, directly and forthrightly, that she did not guarantee any employee tenure in TFD and that she never gave any employee a guarantee that he or she would remain in a specific position, function, or classification.

I find that there is no probative evidence to establish that a valid and enforceable promise was made to Nummer that he would continue to work either as a criminal investigator or that he would – throughout his government service – remain in TFD.

The remaining two issues are interrelated and for that reason will be considered together.

2. Did the Department violate Civil Service Merit Principle No. 1 and Rules 1-1.1, and 1-2.1 by transferring Grievant from the Tax Fraud Division to the Discovery Division?

3. Was the grievant transferred because he is a white male and thus in violation of prohibitions against race and sex discrimination?

The Merit Principles in the Rules of the Civil Service Commission appear to be a preamble; a guiding sense of certain rights and obligations. The operative provisions are then translated into basic rules. The two rules relied upon by Nummer read as follows:

> 1-1.1 Requirement. – All appointments and promotions to positions in the classified service and all measures for the control and regulation of employment in such positions, and separation therefrom, shall be based on merit, efficiency and

fitness.

> 1-2.1 Conditions. – No person shall be discriminated against in seeking employment, in being appointed or promoted, or in any condition of employment, in the classified service, or any separation therefrom, because of race, color, religion, national origin, ancestry, handicap, partisan considerations, age or sex. Age or sex may be determined to a bona fide occupational qualification.

With respect to Section 1-1.1 the argument is that Nummer is more qualified than many (if not all) of the persons who are in the newly combined classification of regulation agent. With respect to Section 1-2.1, the claim is that he was transferred because he is a white male. Those contentions will now be addressed.

The simple answer to both of these claims is that the quoted sections do not apply in this case. The Department reorganized its operations. Civil Service Rules, Section 6-4.1 give it the right to do this.[4] The grievant does not contend that the reorganization was discriminatory or that it was a pretext to remove auditors from TFD. Aside from the promise that he would remain in TFD (previously disposed of), Nummer contends that

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[4] The Rule provides, in relevant part, that the agency has the right: "To determine...matters of material policy;...the method, means and personnel by which government operations are to be conducted; organization structure;...and the right to...assign, [and] transfer...employees...."

his transfer violates the aforesaid Rules.[5]

The Department decided to create the Discovery Division in the fall of 1986. It was to be the flagship operation of a new enhancement program that was to use the technology of computers to detect under-reporting or non-reporting of taxes. The object was to do this on a volume basis which in turn would generate volume revenues for the State. Martin decided that the best way to get this operation under way in the shortest possible time was to use the services of auditors from TFD. Civil Service approval was obtained to renumber (transfer) auditors to this division.

Nummer's job in the Discovery Division is to work with computer reports prepared by the License Bureau of the Secretary of State to determine whether transfers of vehicles claimed to be exempt from tax have been made in compliance with applicable statutes, and if not, to determine the tax and penalty that is owing. Although there may be a great deal of repetition and routine in this position, the work -- contrary to Nummer's assertion – is not clerical, but falls within the broad range of duties generally performed by auditors.[6] Nummer undoubtedly takes a jaundiced view of his new assignment because it lacks the glamour and excitement of his former duties. In spite of this, I find that Nummer's transfer was predicated solely on a business judgment by Martin that

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[5] The root problem in this case may stem from the fact that Grievant finds his new job assignment boring, especially when it is compared to his prior one.

[6] Here, the auditor must look at statistics, evaluate taxpayer circumstances, decide if there has been a violation of the statues, and if so whether a penalty should be imposed.

the Department could best accomplish its mission by using his services (and those of other auditors) in the Discovery Division.

The evidence fails to demonstrate that merit or race were the considering factors in Nummer's transfer. On the matter of merit, there is really no controversy over Nummer's superior ability to perform the functions of a criminal investigator. His expertise in this role was recognized by the Department. He was sent for specialized training and represented the Department with other agencies and with legislative committees. The problem is that Nummer was (and is) overqualified for the job. The criminal investigator and the regulation agent into which it evolved is still essentially a non-professional position. It is for that reason that it commands a lower rate of pay. To move laterally into the regulation agent job, Nummer would be reduced in pay, unless the transfer was on a restricted basis. Indeed, Nummer stated that he would not accept the position at the pay rate associated with it. This was reaffirmed in the written argument "that he be restricted if necessary to preserve his current level of pay." (Page 10).

To restate the obvious hardly seems necessary. Nummer is qualified for the position because he is a professional employee at a level higher than the one under consideration in this case. The provisions of Rule 1-1.1 apply to persons at the same level or in the same classification. They do not apply – as here – to persons already operating in a higher classification. For this reason, I conclude that the Department did not violate the Section 1-1.1 of the Rules in denying Nummer the regulation agent assignment.

On the matter of discrimination, the claim is that

auditors are white males and that most of the persons hired as regulation agents are from minority groups – women and persons of color. Grievant relies on this single fact to establish his claim. It is not sufficient to do so! The transfer was motivated by legitimate business considerations. I find that Grievant has not overcome this fact in his proofs. That the auditors were all men and that mostly women and other minorities replaced them is largely irrelevant because of the differing levels of the two classifications. In addition, the eligibility pool from which the regulation agents were selected was made up primarily of minority persons and this, not discrimination, is the reason for the staffing.

## DECISION

The Department of Treasury's transfer of David A. Nummer from its Tax Fraud to its Discovery Division was based exclusively on business considerations. As such, the transfer did not violate either the Merit Principles, Section 1-1.1 or Section 1-2.1 of the Civil Service Rules. Therefore, the grievance is dismissed.

/s/
Donald F. Sugerman
Hearing Officer

June 14, 1988

## APPENDIX B

STATE OF MICHIGAN

CIVIL SERVICE COMMISSION

EMPLOYMENT RELATIONS BOARD

**A BOARD DECISION** | MAILING DATE

November 9, 1988

DAVID A. NUMMER )
) ERB 88-080
and ) HO 039-88
)
DEPARTMENT OF )
TREASUREY )
)

MEMBERS PARTICIPATING

| | |
|---|---|
| Mr. Jerome H. Brooks | Chairperson |
| Mr. Aubrey V. McCutcheon, Jr. | Member |
| Mr. William J. Braman | Member |

A matter decided after Board conference on November 7, 1988.

## DECISION

The Board considered the application for leave to appeal filed by David A. Nummer, Appellant, from the Decision of Grievance Hearing Officer Donald F. Sugerman denying Appellant's grievance against the Department of Treasury.

Leave to appeal is denied because the Board concludes that no meritorious basis for an appeal of the Grievance Hearing Officer's Decision has been shown by Appellant. See Employment Relations Board Procedures, Article I, Part 4: LEAVE TO APPEAL, Paragraph 401.

This decision of the Board will be filed with the Commission and represent the final decision upon action by the Commission. You will be notified when the decision is final.

[ATTACHMENT 5]

## APPENDIX C

STATE OF MICHIGAN
James J. Blanchard, Governor

CIVIL SERVICE COMMISSION

JOHN F. DODGE, Jr.
WALTER R. GREENE
PATRICIA B. JOHNSON
ALAN A. MAY

EMPLOYMENT RELATIONS BOARD

WILLIAM J. BRAMAN
JEROME H. BROOKS
AUBREY V. McCUTCHEON, Jr.

DEPARTMENT OF CIVIL SERVICE
Lewis Cass Building
320 S. Walnut Street, Box 30002
Lansing, Michigan 48909

Martha Bibbs, State Personnel Director

Mailing Date:
January 20, 1989

FINAL NOTICE

Mr. David Nummer
1039 East Colonial Park
Grand Ledge, MI 48837

Mr. Lamont Walton
Assistant Attorney General
State Affairs Division
Plaza One Building, Suite 3
401 South Washington Square
Lansing, MI 48933

RE: David A. Nummer and Department of Treasury
ERB 88-080; HO 039-88

The Civil Service Commission has reviewed and approved the decision of the Employment Relations Board in this matter pursuant to Chapter 6, Section 6-3, Sub-section 6-3.4(3) of the Commission's Rules. Accordingly, the decision which the Employment Relations Board previously issued now constitutes the final decision of the Commission in this matter.

This decision is subject to appeal to an appropriate Circuit Court within 60 calendar days from the mailing date of this notice. See Michigan Court Rule 7.104(c) and Michigan Compiled Laws, Sections 24.301 through 24.306.

Any question regarding this notice should be addressed to Board Appeals Office John R. O'Connor, Employment Relations Board, Civil Service Commission, P.O. Box 30002, Lansing, Michigan 48909. He can be reached by telephone at (517) 334-6119.

cc:

[ATTACHMENT 6]

## APPENDIX D

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF INGHAM

| | | |
|---|---|---|
| DAVID A. NUMMER,<br><br>Appellant,<br><br>v.<br><br>DEPARTMENT OF TREASURY,<br><br>Appellee. | ) | File No.<br>89-63350-AA<br><br>**OPINION OF THE COURT** |

OPINION OF THE COURT

David A. Nummer (Appellant) seeks judicial review pursuant to the Administrative Procedures Act, MCL 24.301, et seq; MSA 3.560(201), et seq, of a final decision of the Civil Service Commission (Commission) denying his grievances concerning his involuntary transfer from the Tax Fraud Division of the Department of Treasury (Department). Both the Employment Relations Board and the Civil Service Commission have denied as

unmeritorious Appellant's application for leave to appeal a Hearing Officer's decision.

On appeal, Appellant argues the decision that his involuntary transfer did not violate any enforceable promise made by the Department and did not violate Civil Service rules regarding merit and discrimination is not supported by competent, material, and substantial evidence.

In 1970, Appellant began working for the Michigan Department of Treasury as an auditor. In 1978, he was assigned as an auditor to the Intelligence Unit. This unit combined with other units and later became known as the Tax Fraud Division (TFD). Appellant worked in the TFD until January, 1987, when he was transferred, along with all other TFD auditors, to the Discovery Division.

Prior to his transfer, TFD was composed of two job classifications: auditors and crime investigators. Auditors were in a professional classification and received a higher rate of pay than the nonprofessionally classified crime investigators. Nevertheless, the two classifications performed similar tasks, and the lines of demarcation between the two blurred. As a result of this and the unavailability of a career track for advancement, TFD experienced low employee morale. The blurring of job duties and low morale led the administrator of TFD to recommend to the Commissioner of Finance that the Department seek reclassification of the two positions into a single classification. This reorganization into a single, common classification was pursued with varying degrees of progress from 1981 through 1986. However, that particular reorganization never occurred. Rather, the TFD crime investigators were grandfathered into a newly

created revenue/regulation agent classification and all eight TFD auditors were transferred to the Treasury Department's newly created Discovery Division. The Discovery Division operates to uncover tax evaders, nonfilers, and underreporters by use of computer record matching. (Record, Section A, Exhibits D10 and D12). Uncovering tax evaders, nonfilers, and underreporters had previously been one of the functions of TFD. (Record, Section A, Exhibit D12).

A decision by the Civil Service Commission may be reversed only if it is not supported by "competent, material and substantial evidence on the whole record" or if there is an abuse of discretion. O'Neill v Civil Service Comm, 121 Mich App 256; 328 N.W.2d 547 (1981), Crider v State of Michigan, 110 Mich App 702; 313 N.W.2d 367 (1981), Parnis v Civil Service Comm, 79 Mich App 625; 262 N.W.2d 883 (1977). The substantial evidence test has been defined as evidence a reasoning mind would accept as sufficient to support a conclusion. While the test requires more than a "mere scintilla" of evidence, substantially less that a preponderance of the evidence is necessary. Tompkins v Dept of Social Services, 97 Mich App 218, 222; 293 N.W.2d 771 (1980). If there is evidence on the record to support the administrative agency's decision, the reviewing court will not substitute its opinion for that of the agency even if the court might have reached a different result had it been sitting as the agency. Viculin v Dept of Civil Service, 386 Mich 375; 192 N.W.2d 449 (1971). Moreover, the Civil Service Commission has special standing under the State Constitution. It possesses plenary power"within its sphere of authority. Viculin v. Dept. of Civil Service, supra, 393.

The Court's review of a Commission decision is

not de novo. Viculin, supra, 392. The Court accords due deference to administrative expertise and will not invade the province of exclusive fact-finding by displacing the Commission's choice between two reasonably differing views. O'Neill, supra, 260.

In support of his contention that an enforceable promise was made, Appellant cites handwritten notes of Susan Wark Martin, Commissioner of Revenue, a letter dated December 11, 1986, from George Minerick, Head of the Civil Service Commissions Classification Division to Patricia Pickett of Personnel and Training, Department of Treasury, Appellant's own testimony and Appellant's continued employment with TFD performing the hybrid function of auditor/crime investigator.

Review of this case is hampered by lack of the transcript of the oral testimony before the Civil Service Commission. Neither party requested transcription of the oral proceedings, which was their responsibility, pursuant to MCL 24.286(2); MSA 3.560(186)(2). MCR 7.104(C). This Court's review is confined to the record presented. MCL 24.304(3); MSA 3.560(204)(3).

Appellant asserts that, at a meeting in April, 1986, Revenue Commissioner Martin advised the TFD staff that the common classification had been approved; and, if they did not desire to become regulation agents, they should seek other employment. Appellant cites Ms. Martin's handwritten notes as proof of her statements, and construes her statements as a promise of continued employment in TFD in the new revenue/regulation agent classification.

This Court does not have the benefit of hearing Ms. Martin's testimony. The Hearing Officer who had

that opportunity wrote:

> "I credit Martin who testified, directly and forthrightly, that she did not guarantee any employee tenure in TFD and that she never gave any employee a guarantee that he or she would remain in a specific position, function, or classification." (Record, H-5-6).

This Court must accord due weight to the Hearing Officer's opportunity to evaluate Ms. Martin's testimony. Mich Employment Relations Comm v Detroit Symphony Orchestra Inc, 393 Mich 116, 127; 223 N.W.2d 283 (1974), O'Neill, supra, 260. The handwritten notes, however, do not contradict the Hearing Officer's evaluation of Ms. Martin's testimony. Reference in the handwritten notes to a "professional elite investigation staff" are neutral as to whether the investigation will be done by surveillance or by computer check. The notes state: "People who want to select own cases, not be accountable in writing, have been unhappy for [illegible] – my advice get out." (Record, A, D-7).

In this Court's estimation, this does not support Appellant's assertion that Ms. Martin advised those who did not want to become revenue/regulation agents to seek employment elsewhere. Nor is there anything in the December 11, 1986 letter from George Minerick to Patricia Pickett which indicates that any promises or assurances were made to appellant. Granted, Appellant continued to work in the hybrid auditor position until his transfer. However, the record does not reflect promises or assurances by the Department of Treasury to the TFD auditors which could justify Appellant's alleged reliance that he would become a revenue/regulation agent if or

when such classification was created, if he continued in the position of TFD auditor. A "promise" is the first element which Appellant had to prove to establish an "estoppel" claim. See Huhtala v Travelers Ins Co, 401 Mich 118, 125 and n 4; 257 N.W.2d 640 (1977). The finding of no promise is supported by competent, material and substantial evidence on the whole record.

Appellant also argues that the decision that the transfer was not in violation of Civil Service rules regarding merit and discrimination is not supported by competent, material, and substantial evidence. Essentially, Appellant argues that he was more qualified for a revenue/regulation position than those hired and that the replacement of white male auditors with female and/or minority revenue/regulation agents proves discrimination.

The Civil Service rules at issue are as follows:

> "1-1.1 Requirement. – All appointments and promotions to positions in the classified service and all measures for the control and regulation of employment in such positions, and separation therefrom, shall be based on merit, efficiency and fitness.
>
> 1-2.1 Conditions. – No person shall be discriminated against in seeking employment, in being appointed or promoted, or in any condition of employment, in the classified service, or any separation therefrom, because of race, color, religion, national origin, ancestry, handicap, partisan considerations, age or

> sex. Age or sex may be determined to a bona fide occupational qualification."

The Hearing Officer found that the above-quoted sections did not apply to Appellant's case. Rather, the Hearing Officer found that Rule 6-4.1 applied. Rule 6-4.1 provides, in pertinent part, that the agency has the right:

> "To determine...matters of managerial policy...the method, means and personnel by which government operations are to be conducted; organization structure; and the right to...assign, [and] transfer...employees...." (Record, H-6-7 and n 4)

The Court accords due deference to the Commission on this point. O'Neill, supra.

Competent, material, and substantial evidence supports the decision that the merit rule, Rule 1-1.1 was not violated. The record plainly indicates that the TFD auditors were overqualified for the work they performed. They did essentially the same work as the TFD crime investigators who were in a nonprofessional classification and received lower pay. In addition, the revenue/regulation agent positions to which Appellant claims entitlement are nonprofessional positions, below Appellant's current and prior job classification levels. (Record, Sec. A, G-12, p 2). Again, the transcript which might contain contrary testimony, is not before this Court. Based on the evidence presented, placing Appellant in a regulation agent position would have been an inefficient use of personnel and would have resulted in a demotion.

With regard to the anti-discrimination rule, Rule 1-2.1, Appellant claims that the Department's actions were motivated by discriminatory intent which can be inferred from the fact of discriminatory treatment. In this regard, Appellant asserts that field officers from outside TFD were appointed as administrators and supervisors of the Discovery Division, that the TFD auditors' duties in Discovery were clerical, and that most of the newly created regulation agent positions were filled by minorities. These assertions are not supported by the record, and Petitioner makes no cites to the record to substantiate his position as required by applicable rules. MCL 24.302; MSA 3.560(202), MCR 7.104(C). See MCR 7.101(I)(1), MCR 7.105(K)(1), MCR 7.212(C)(5) and (6). Again, the transcript of testimony was not presented for the Court's review.

With regard to the discrimination claim, the Hearing Officer found that Appellant's transfer was "motivated by legitimate business considerations." (Record, H-8) The competent, material, and substantial evidence presented supports the determination. The record indicates that need, skill, efficiency, and cost-effectiveness motivated the TFD auditors transfer. The record further indicates that appointment to a revenue/regulation agent position would have been a demotion for Appellant and the other auditors and that the auditors were give a choice of transfer to the Discovery Division or to field auditor positions. The evidence does not indicate a discriminatory motive.

The decision is **AFFIRMED**.

/s/
Michael G. Harrison
Circuit Judge

Dated: January 5, 1990

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR
THE COUNTY OF INGHAM

| | | |
|---|---|---|
| DAVID A. NUMMER, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| v | ) | **ORDER** |
| | ) | |
| DEPARTMENT OF TREASURY, | ) | File No. 89-63350-AA |
| | ) | |
| Appellee. | ) | |

At a session of said Court held in the City of Lansing, Ingham County, Michigan, on the 5th day of January, 1990, the Hon. Michael G. Harrison presiding.

A petition for judicial review having been filed by David A. Nummer, Appellant, and the Court being fully advised in the premises,

**IT IS ORDERED** that the decision of the Civil Service Commission is **AFFIRMED**.

/s/
Michael G. Harrison
Circuit Judge

PROOF OF SERVICE

I do hereby certify and return that I served a copy of the above order upon each attorney of record by placing said order in a sealed envelope address to each with full postage prepaid thereon and placing said envelope in the United States Mail at Lansing, Michigan on January 5, 1990.

Dated: January 5, 1990

/s/
Secretary Virginia Hulbert

## APPENDIX E

Order of Judge Giddings

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR
THE COUNTY OF INGHAM

| | | |
|---|---|---|
| DAVID NUMMER, | ) | |
| | ) | |
| Plaintiff, | ) | No. 89-65138-CL |
| | ) | Hon. James R. |
| v | ) | Giddings |
| | ) | |
| MICHIGAN | ) | **ORDER** |
| DEPARTMENT OF | ) | |
| TREASURY | ) | |
| Defendant. | ) | |

Philip Green (P 14316)
Attorney for Plaintiff

Gary P. Gordon (P 26290)
Assistant Attorney General
Attorney for Defendant
Public Employment and Elections
Division

P.O. Box 30212
Lansing, MI 48909
(517) 373-6434

**ORDER**

At a session of said Court held in the City of Lansing, Michigan, on the 28th day of March, 1991.

PRESENT: Honorable James R. Giddings
Circuit Judge

Defendant having filed a Motion for Summary Disposition and Brief in support on the basis that the decision of the Civil Service Commission, which as affirmed by the Ingham County Circuit Court in the case Nummer v Dep't of Treasury, No. 89-63350 (January 5, 1980 [sic]) requires dismissal due to collateral estoppel; and Plaintiff having filed a brief in reply and oral argument having taken place before this Court on March 13, 1991, and this Court being fully advised in the premises;

IT IS HEREBY ORDERED that based upon the reasons set forth on the record in the oral opinion of this Court, Defendant's Motion for Summary Disposition is GRANTED and this matter is dismissed with prejudice.

James R. Giddings
Circuit Judge

APPROVED AS TO FORM:

/s/
Philip Green
Attorney for Plaintiff

/s/
Gary P. Gordon
Assistant Attorney General
Attorney for Defendant

## APPENDIX F

Opinion of Court of Appeals

[July 1993]
NUMMER v TREASURY DEP'T

NUMMER v DEPARTMENT OF TREASURY

Docket No. 139570. Submitted May 5, 1993, at Lansing. Decided July 19, 1993, at 9:55 A.M. Leave to appeal sought.

David Nummer brought an action in the Ingham Circuit Court against the Department of Treasury, alleging breach of an employment contract and race and sex discrimination in violation of the Civil Rights Act. The defendant sought summary disposition, arguing that the plaintiff was collaterally estopped from litigating those issues because they had been litigated previously before the Civil Service Commission. The court, James R. Giddings, J., granted the motion, holding that the plaintiff's complaint was barred by collateral estoppel, on the basis of the following facts. The plaintiff filed a grievance with the Department of Civil Service alleging violation of a promise not to transfer him and that his transfer was the result

REFERENCES

Am Jur 2d, Administrative Law §§ 500-502; Civil Rights § 370. See ALR Index under Administrative Law; Civil Rights; Collateral Estoppel.

[July 1993]
200 MICH APP 695

Of race and sex discrimination. A hearing officer denied the grievance, and the Employment Relations Board denied leave to appeal the hearing officer's decision. The Civil Service Commission issued a final decision approving the determination of the Employment Relations Board. The plaintiff appealed that decision to the Ingham Circuit Court, and the court, Michael G. Harrison, J., upheld the civil Service Commission's decision. Before the circuit court's affirmance, the plaintiff filed the complaint that was dismissed by Judge Giddings. The plaintiff appealed from the order granting summary disposition.

The Court of Appeals *held*:

1. Where the initial forum is an administrative agency, the doctrine of collateral estoppel is to be applied only when the procedures are adjudicatory in nature, a method of appeal is provided, and it is clear that the Legislature intended to make the determination final in the absence of an appeal. The doctrine is not to be applied if it is incompatible with a legislative policy that permits a court to make an independent determination of an issue in question in a subsequent civil proceeding.

2. The Legislature, in enacting the Civil Rights Act, chose to set aside the principles of collateral estoppel and to countenance a multiplicity of litigation in civil rights cases. The Legislature intended that civil rights litigants have "two bites of the apple," even if two separate proceedings reach opposite results or engender

repetitious or needless litigation in violation of the principles of collateral estoppel.

3. The doctrine of collateral estoppel does not preclude the plaintiff from bringing his race and sex discrimination claims in the circuit court, despite the fact that he litigated the issues before the Civil Service Commission, whose final decision was affirmed by the circuit court. The Civil Rights Act allows the plaintiff to pursue a civil rights action in both forums. The order of summary disposition must be reversed with regard to the claims of race and sex discrimination.

4. Collateral estoppel does preclude the plaintiff from bringing a separate action in the circuit court alleging breach of contract. The order of summary disposition must be affirmed with regard to the claim of breach of contract.

Affirmed in part, reversed in part, and remanded.

1. Civil Rights – Actions – Collateral Estoppel.

The Legislature, in enacting the Civil Rights Act, chose to set aside the principles of collateral estoppel in civil rights cases and to countenance a multiplicity of litigation; therefore, a plaintiff whose civil rights claim is denied by the Civil Service Commission, the decision of which is affirmed by the circuit court, may file an original action in the circuit court, which may conclude otherwise and award injunctive relief or damages, including costs and reasonable attorney fees (MCL 37.2101 *et seq.*, MSA

3.548[101] *et seq.*).

2. Estoppel – Collateral Estoppel – Administrative Law – Actions.

Collateral estoppel precludes a state civil service employee from bringing an action in the circuit court alleging breach of an employment contract where the Civil Service Commission has determined that no breach occurred and that decision has been affirmed by the circuit court.

*Green & Green* (by *Philip Green*), for the plaintiff.

*Frank J. Kelley*, Attorney General, *Thomas L. Casey*, Solicitor General, and *Gary P. Gordon*, Assistant Attorney General, for the defendant.

Before: WAHLS, P.J., and SHEPHERD and CAVANAGH, JJ.

SHEPHERD, J. Plaintiff appeals as of right a March 28, 1991, order granting defendant's motion for summary disposition, dismissing plaintiff's breach of contract claim and his race and sex discrimination claims under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* We affirm in part, reverse in part, and remand for additional proceedings.

I

Plaintiff began working for defendant as an

auditor in 1970. In 1978, he was assigned to the intelligence unit in the Tax Fraud Division. In 1987, plaintiff and all other Tax Fraud Division auditors were transferred to the newly formed Discovery Division within the Department of Treasury. Soon thereafter, plaintiff filed a grievance with the Department of Civil Service, alleging that his transfer violated an enforceable promise made by defendant that he would continue in the Tax Fraud Division and was the result of race and sex discrimination.

On June 17, 1988, a hearing officer denied the grievance, finding no evidence to establish that there was a valid and enforceable promise not to transfer plaintiff. In addition, the hearing officer found no evidence showing race or sex discrimination, and that the transfer was based upon legitimate business considerations. Plaintiff then sought leave to appeal the hearing officer's decision, which the Employment Relations Board denied on November 7, 1988. On January 20, 1989, the Civil Service Commission issued a final decision approving the determination of the Employment Relations Board. Subsequently, plaintiff appealed to the circuit court, which upheld the Civil Service Commission's decision in an order dated January 5, 1990.

However, just before the circuit court's affirmance, plaintiff filed a complaint in the circuit court, alleging a breach of contract and race and sex discrimination in violation of the Civil Rights Act. In response, defendant filed a motion for summary disposition pursuant to MCR

2.116(C)(7), arguing that plaintiff was collaterally estopped from litigating these issues because they had been litigated previously before the Civil Service Commission. On March 13, 1991, the trial court granted defendant's motion, holding that plaintiff's complaint was barred by collateral estoppel.

On appeal, the principal question before us is whether decisions of the Civil Service Commission have collateral estoppel effect in a subsequent lawsuit filed in circuit court alleging race and sex discrimination in violation of the Civil Rights Act.

II

It is established law in this state that when the initial forum is an administrative agency, the doctrine of collateral estoppel is to be applied only when the procedures are adjudicatory in nature, when a method of appeal is provided, and when it is clear that the Legislature intended to make the determination final in the absence of an appeal. *Storey v. Meijer, Inc.*, 431 Mich 368, 373; 429 N.W.2d 169 (1988); *Senior Accountants, Analysts & Appraisers Ass'n v Detroit*, 399 Mich 449, 457-458; 249 N.W.2d 121 (1976). However, the doctrine of collateral estoppel is not to be applied if it is incompatible with a legislative policy that permits a court to make an independent determination of an issue in question in a subsequent civil proceeding. *Storey, supra*, p 377; 2 Restatement Judgments, 2d § 83, p 267.

[July 1993]
200 MICH APP 695

Under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, employers are prohibited from discriminating against individuals on the basis of race or sex. MCL 37.2202; MSA 3.548(202); *Walters v Dep't of Treasury*, 148 Mich App 809, 815; 385 N.W.2d 695 (1986). An individual aggrieved by an employer's violation of the Civil Rights Act may file a complaint with the Department of Civil Rights to be heard by the Civil Rights Commission, MCL 37.2601- 37.2605; MSA 3.548(601)-3.548(605), or bring an action in the circuit court for appropriate injunctive relief or damages, MCL 37.2801; MSA 3.548(801). *Walters*, p 815; *Marsh v Dep't of Civil Service*, 142 Mich App 557, 562; 370 N.W.2d 613 (1985). The Civil Rights Commission and the circuit court have concurrent jurisdiction over civil rights claims, and an aggrieved individual may proceed simultaneously in both forums. *Walters*, p 815; *Marsh*, p 563. Exhaustion of administrative remedies is not required before filing suit in the circuit court. *Walters*, p 816; *Marsh*, pp 562-563.

In *Marsh*, this Court held that the plaintiff was entitled to pursue in the circuit court an action alleging sex discrimination, even after the plaintiff had fully exhausted the civil service grievance procedures, including an appeal to the Civil Service Commission. A similar conclusion was reached in *Walters*, where this Court held that the plaintiff was not required to exhaust administrative remedies before filing an action in the circuit court for violation of her civil rights. See also *DeMara v Governor*, 183 Mich App 87; 454 N.W.2d 401 (1990), where this Court held that a military reservist

need not pursue his administrative remedies before filing an age discrimination suite in the circuit court.

When construing statutory provisions, courts are to ascertain and give effect to the intent of the Legislature. *Storey, supra*, p 376. Where the language of the statute is clear and unambiguous, no further interpretation is necessary. *Id.*

It is clear that in enacting the Civil Rights Act, the Legislature chose to set aside the principles of collateral estoppel in civil rights cases and to countenance a multiplicity of litigation. As provided by the statutory scheme, the Legislative intended to permit civil rights litigants to have "two bites of the apple," even if two separate proceedings reach opposite results or engender repetitious and perhaps needless litigation in violation of the principles of collateral estoppel. As this Court noted in *Walters, supra*, p 819 quoting *Pompey v General Motors Corp*, 385 Mich 537, 560; 189 N.W.2d 243 (1971), a civil action for the redress of a violation of a civil rights statute may be pursued in addition to "'the remedial [administrative] machinery provided by statute.'" Thus, a plaintiff whose civil rights claim is denied by the Civil Service Commission may file an original action in the circuit court, which may conclude otherwise and award injunctive relief or damages, including costs and reasonable attorney fees.

III

Applying the foregoing analysis to the instant case, we hold that the doctrine of collateral estoppel does not preclude plaintiff from bringing his race and sex discrimination claims in the circuit court, despite the fact that plaintiff litigated the issues before the Civil Service Commission, whose final decision was affirmed by the circuit court.

To hold otherwise would allow a plaintiff to exhaust the administrative grievance procedures, not appeal, and then initiate a separate action for a civil rights violation in the circuit court, e.g., *Marsh, supra*, but not allow a plaintiff to exhaust administrative procedures, appeal to the circuit court, and then commence a civil rights cause of action in the circuit court. This disparity in treatment would be inconsistent with the clear legislative policy underpinning the Civil Rights Act, which expressly allows a plaintiff to pursue a civil rights action in both forums. In this regard, we note that in the appeal of the administrative decision in this action the circuit court was sitting, not as a court of original jurisdiction, but as an appellate court, and, thus, was reviewing the decision of the Civil Service Commission to determine whether its decision was supported by competent, material and substantial evidence. Const 1963, art 6, § 28; *Marsh, supra*, pp 560-561, n 1. Although it is true that the circuit court decided both cases, that court was acting in different capacities.

Furthermore, we note that the trial court's reliance upon *O'Keefe v Dep't of Social Services*, 162 Mich App 498;

413 N.W.2d 32 (1987), is misplaced because that case does not address the collateral estoppel effect of an administrative decision in a civil rights case. In *O'Keefe*, the plaintiff filed an action in the circuit court alleging various claims, including a violation of the right of fair representation and breach of contract, after the Civil Service Commission affirmed a decision of a hearing officer dismissing the plaintiff's charge of unfair labor practice. This Court concluded that, under the doctrine of collateral estoppel, the hearing officer's determination that there was no breach of the duty of fair representation precluded the plaintiff from bringing a separate action for breach of contract. *Id.*, p 510. Although collateral estoppel does preclude plaintiff in the instant case as well from bringing a separate action in the circuit court for a breach of contract, it does not prevent him from pursuing his race and sex discrimination claims.

Accordingly, we affirm the trial court's grant of summary disposition in favor of defendant regarding plaintiff's breach of contract claim, but reverse regarding plaintiff's race and sex discrimination claims under the Civil Rights Act, and remand for further proceedings regarding those claims only.

Affirmed in part, reversed in part, and remanded.

## APPENDIX G

448 Mich. 534

**David NUMMER,** Plaintiff-Appellee,

v.

**TREASURY DEPARTMENT,**
Defendant-Appellant.

No. 97343.

Supreme Court of Michigan.
May 2, 1995.

After Civil Service Commission determined that agency did not discriminate against employee on basis of race and gender or breach contract when it transferred him, employee filed new, original contract and discrimination action against agency, which responded that Commission's determination collaterally estopped employee from relitigating discrimination issue. The Circuit Court, Ingham County, Michael G. Harrison, J., granted summary judgment for agency. Employee appealed. The Court of Appeals, Shepherd, J., 200 Mich.App. 695, 504 N.W.2d 724, held that collateral estoppel applied to contract claim but not to civil rights claim. Agency appealed. The Supreme Court, Riley, J., held that employee was collaterally estopped from relitigating discrimination issue, since legislature did not

intend that Commission's decision be final absent appeal.

Reversed.

Mallett, J., dissented and filed opinion in which Michael F. Cavanaugh, J., joined.

Levin, J., dissented and filed opinion.

**1. Judgment - Key No. 634**

Preclusion doctrine serves important function in resolving disputes by imposing state of finality to litigation where same parties have previously had full and fair opportunity to adjudicate their claims.

**2. Judgment - Key No. 634**

By putting end to litigation, preclusion doctrines serve functions of eliminating costly repetition, conserving judicial resources, and easing fears of prolonged litigation.

**3. Administrative Law and Procedure - Key No. 501**
**Judgment - Key No. 634**

Whether determination is made by agency or court is inapposite in determining whether preclusion doctrine applies; interest in avoiding costly and repetitive litigation, as well as preserving judicial resources, exists in either case.

**4. Judgment - Key No. 634**

Generally, for collateral estoppel to apply, question of fact essential to judgment must have been

factually litigated and determined by valid and final judgment; in addition, the same parties must have had full opportunity to litigate the issue, and there must be mutuality of estoppel.

**5. Administrative Law and Procedure - Key No. 501**

Where party seeks to preclude relitigation on basis of administrative decision as opposed to court decision, it must meet three requirement in addition to those generally required for collateral estoppel, which three requirements are that administrative determination must have been adjudicatory in nature and have provided right to appeal, and legislature must have intended to make decision final absent appeal.

**6. Administrative Law and Procedure - Key No. 501**
**Officers and Public Employees - Key No. 72.33(1)**

Employee, who filed new, original discrimination action against agency after Civil Service Commission had determined that agency did not discriminate against employee when it transferred him, was collaterally estopped from relitigating discrimination issue; even assuming that Civil Service Commission determination should be akin to Civil Rights Commission determination, statute providing that appeal from Civil Rights Commission be reviewed de novo did not indicate legislative intent that Commission's decision be final, absent appeal. M.C.L.A. § 37.2606(1).

NUMMER v. TREASURY DEPT.
533 N.W.2d 250 (Mich. 1995)

**7. Constitutional Law - Key No. 55**

Legislature is free to modify strict application of preclusion doctrines in any statutory scheme, since preclusion doctrines are judicial creations, developed and extended from common law.

**8. Statutes - Key No. 212.1**

Legislature is deemed to legislate with understanding of common-law adjudicatory principles.

**9. Administrative Law and Procedure - Key No. 229**
**Civil Rights - Key No. 444**

Exhaustion of administrative remedies is not required before filing action under Elliott-Larsen Civil Rights Act in circuit court. M.C.L.A. Const. Art. 5, § 29. M.C.L.A. § 37.2101 et seq.

**10. Estoppel - Key No. 52(1)**

Estoppel must work both ways, pursuant to doctrine of mutuality of estoppel.

**11. Constitutional Law - Key No. 70.3(4, 5)**

When searching for legislative intent, court's duty is simply to construe legislative will as court finds it, without regard to court's own views as to wisdom or justice of statute.

NUMMER v. TREASURY DEPT.
533 N.W.2d 250 (Mich. 1995)

**12. Statutes - Key No. 212.1**

Legislature is presumed to legislate with knowledge of an regard to existing laws upon same subject.

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Green & Green by Christine A. Green, Ann Arbor, for plaintiff.

Frank J. Kelley, Atty. Gen., Thomas L. Casey, Sol. Gen., and Gary P. Gordon and John F. Szczubelek, Asst. Attys. Gen. For defendant.

RILEY, Justice.

In this case, we decide whether a formal and final decision by the Civil Service Commission rejecting a discrimination claim precludes relitigation of that issue in a subsequently filed action in circuit court. We hold that collateral estoppel bars relitigation of this claim. Accordingly, we reverse the decision of the Court of Appeals.

I

Plaintiff David Nummer is a white male who was hired as an auditor by the Treasury Department in 1970 and transferred to the intelligence unit of the Tax Fraud Division in 1978. Plaintiff remained in the Tax Fraud Division until 1987, when all Tax Fraud Division auditors

were transferred to the newly formed Discovery Division within the Department of Treasury. Plaintiff objected to the transfer and filed a grievance with the Department of Civil Service. His grievance alleged two theories of recovery: first, that the Department of Treasury breached a contractual promise that he would remain within the Tax Fraud Division and second, that the transfer constituted discrimination on the basis of race and gender in violation of the civil service provisions set forth in art. 11 § 5, of the Michigan Constitution.[1]

On June 17, 1988, the civil service hearing officer denied recovery on both theories. Plaintiff appealed the decision to the Employment Relations Board, which

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[1] Const. 1963, art. 11, § 5, states that the Civil Service Commission shall have the power to "regulate all conditions of employment in the classified service," and that "[n]o appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations." Pursuant to Const. 1963, art. 11, § 5, the Civil Service Commission has the authority to promulgate rules to effectuate the mandates of § 5. In addressing the plaintiff's discrimination allegation, the commission assessed whether the Department of Treasury violated Civil Service Rule 1-2.1, which in pertinent part states:

> No person shall be discriminated against in seeking employment, in being appointed or promoted, or in any condition of employment, in the classified service, or any separation therefrom, because of race, color, religion, national origin, ancestry, handicap, partisan considerations, age or sex.

denied leave.[2] The Civil Service Commission subsequently reviewed and approved the Employment Relations Board's decision. Plaintiff then appealed the final determination of the commission to the circuit court, which affirmed the commission's determination.

While plaintiff's appeal was pending in circuit court, and before that court issued its opinion affirming the decision of the commission, plaintiff filed a new action in circuit court. The second case, also based on plaintiff's transfer to the Discovery Division, alleged breach of contract and race and sex discrimination in violation of the Civil Rights Act. M.C.L. § 37.2101 *et seq.*, M.S.A. § 3.548(101) *et seq.*

Defendant responded to the second action by alleging that the commission's determination that the transfer did not breach any contractual obligation and that the transfer was not for discriminatory reasons collaterally estopped redetermination of these issues in the circuit court. The circuit court agreed that plaintiff was collaterally estopped from bringing either the contract issue or the discrimination issue and dismissed the complaint.

Plaintiff appealed the dismissal in the Court of Appeals. The court held that the contract issue was

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[2] The board "conclude[d] that no meritorious basis for an appeal of the Grievance Hearing Officer's Decision has been shown by Appellant."

collaterally estopped,[3] but that collateral estoppel did not apply to the civil rights claim. The Court of Appeals refused to apply collateral estoppel to the discrimination issue because it believed that the Legislature, in the civil rights arena, "chose to set aside the principles of collateral estoppel in civil rights cases and to countenance a multiplicity of litigation." 200 Mich. App. 695, 700, 504 N.W.2d 724 (1993). Defendant appealed, and we granted leave.[4]

II

[1-3] The preclusion doctrines serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims. *Storey v. Meijer, Inc.*, 431 Mich. 368, 372, 429 N.W.2d 169 (1988). By putting an end to litigation, the preclusion doctrines eliminate costly repetition, conserve judicial resources, and ease fears of prolonged litigation. Whether the determination is made by an agency or court is inapposite; the interest in avoiding costly and repetitive litigation, as well as preserving judicial resources, still remains. *Univ. Of Tennessee v. Elliott*, 478 U.S. 788, 798, 106 S. Ct. 3220, 3225-3226, 92 L.Ed. 2d 635 (1986)

[4] At issue in this case is the doctrine of collateral estoppel. Generally, "[f]or collaterally estoppel to apply,

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[3] The contract issue is not before us.

[4] 445 Mich. 934, 521 N.W.2d 15 (1994).

a question of fact essential to the judgment must have been factually litigated and determined by a valid and final judgment. In addition, the same parties must have had a full opportunity to litigate the issue, and there must be mutuality of estoppel." *Storey, supra* at 373, n. 3, 429 N.W.2d 169.

[5] However, because defendant is seeking to preclude relitigation on the basis of an administrative decision, three additional requirement must be satisfied. The administrative determination must have been adjudicatory in nature an provide a right to appeal, and the Legislature must have intended to make the decision final absent an appeal. *Senior Accountants, Analysts & Appraisers Ass'n v. Detroit*, 399 Mich. 449, 457-458, 249 N.W.2d 121 (1976); *Roman Cleanser Co. v. Murphy*, 386 Mich 698, 703-704, 194 N.W.2d 704 (1972). See also *Storey, supra*, at 373, 429 N.W.2d 169.

It is not seriously contested that the general requirements of collateral estoppel are met and that at least the first two requirements for administrative estoppel are satisfied. In the Civil Service Commission, plaintiff alleged that the Department of Treasury violated Civil Service Commission Rule 1-2.1.[5] This claim between the same parties involved a similar factual issue as that which was actually litigated and decided in the Civil Service Commission. Moreover, plaintiff was represented by counsel before the agency; had the opportunity to, and

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[5] See n. 1.

did in fact, call witnesses; and had a full hearing on the merits of his claim.[6] In addition, he appealed this decision to the Employment Relations Board and then to the Civil Service Commission.

This proceeding, therefore, clearly was not summary in nature. See *Storey, supra*. Furthermore, it is disingenuous to argue that plaintiff did not have a full opportunity to present his claim or that the adjudicatory nature of the proceeding is not sufficiently akin to a judicial proceeding.[7] Indeed, neither party suggests that the proofs required in the agency determination differ from a Civil Rights Act claim in circuit court.

In terms of the right to appeal, plaintiff certainly was afforded numerous opportunities. In addition to the two intra-agency appeals, he obtained review in the circuit court. Thus, plaintiff had the opportunity to appeal, did in fact appeal; and, hence, satisfies the second part of administrative estoppel.

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[6] Plaintiff does not seriously contend that he did not have a full and fair opportunity to present his case before the Civil Service Commission.

[7] We wish to make clear that the issue decided today only would affect agency decisions by formal hearing. See *Strachan v. Mutual Aid & Neighborhood Club, Inc.*, 407 Mich. 928, 285 N.W.2d 297 (1979), in which we held that a Civil Rights Commission decision to dismiss for "insufficient evidence was not adjudicatory in nature and thus does not bar subsequent proceedings in circuit court.

NUMMER v. TREASURY DEPT.
533 N.W.2d 250 (Mich. 1995)

[6] The point of contention in this case centers on the third element of administrative estoppel, i.e., that the Legislature intended the decision to be final absent an appeal. Plaintiff and Justice Mallett reply on M.C.L. § 37.2606(1); M.S.A. § 3.548(606)(1), which provides the standard of review on appeal from the Civil *Rights* Commission: "An appeal before the circuit court shall be reviewed de novo." Even assuming that a Civil Service Commission determination should be akin to a Civil Rights Commission determination, a plaintiff whose claim is fully adjudicated by a formal hearing is only afforded the opportunity to *appeal* the decision and receive a de novo review, but is not afforded the right to file a complaint anew raising the same claim. In this case, plaintiff appealed to the circuit court and received a review under a competent, material, and substantial evidence standard.[8] *Viculin v. Civil Service Dep't.*, 386 Mich. 375, 392, 192 N.W.2d 449 (1971). While this appeal was pending, plaintiff decided to file a new, original action in the same court. This new action was assigned to a different judge who had to decide issues on the basis of the same factual setting. There is absolutely no legislative intent for this multiplicity of litigation.

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[8] This standard of review is not "on the merits," but it is the one provided by the people of the State of Michigan, and one that the Legislature has not seen fit to change. In any event, plaintiff does not contend that this standard of review was inappropriate and that a de novo review should be imposed instead. Justice Levin's opinion fails to acknowledge this part of the record. Op. At 270.

III

[7, 8] Preclusion doctrines are judicial creations, developed and extended from the common law. Accordingly, the Legislature is free to modify its strict application in any given statutory scheme. 2 Davis & Pierce, Administrative Law (3d ed), § 13.3, p. 256. However, the Civil Rights Act is devoid of any statement that traditional preclusion rules do not apply to this statutory scheme. Hence, the difficulty lies in determining whether an intent can be *inferred* from the statutory scheme. Davis & Pierce, *supra*. In doing so, it must be remembered that the Legislature is deemed to legislate with an understanding of common-law adjudicatory principles. *Garwols v. Bankers Trust Co.*, 251 Mich. 420, 424-425, 232 N.W. 239 (1930); *Astoria Federal S. & L. Ass'n v. Solimino*, 501 U.S. 104, 107-108, 111 S.Ct. 2166, 2169-2170, 115 L.Ed.2d 96 (1991).

A

To date, the closest this Court has come to making such a determination was in *Storey, supra*. We considered whether a determination by the Michigan Employment Security Commission, precluded relitigation of the same issue regarding dismissal in a subsequent civil suit for wrongful discharge and breach of employment contract. In terms of legislative intent to modify traditional preclusion principles, we found M.C.L. § 421.11(b)(1); M.S.A. § 17.511(b)(1) controlling. It provides:

> Except as provided in this act, such

> information and determinations shall not be used in any action or proceeding before any court or administrative tribunal unless the commission is a party to or a complainant in the action or proceeding, or unless used for the prosecution of fraud, civil proceeding, or other legal proceeding pursuant to subdivision (2).

Accordingly, this Court held "that § 11(b)(1) clearly and unambiguously prohibits the use of MESC information and determinations in subsequent civil proceedings unless the MESC is a party or complainant in the action." *Storey, supra* at 376, 429 N.W.2d 169.[9]

Federal cases have reached similar conclusions, but under slightly less explicit direction from Congress. For example, in *Solimino, supra,* the Court held that an age discrimination claim[10] is not precluded by a judicially unreviewed finding by a state administrative agency. The Court refused to rely on any negative intend, i.e., that Congress did not make a clear statement abrogating

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[9] The Court also found support in the inferred legislative policy that the unemployment system was designed to render quick results that presumably create a disincentive to fully litigate the issue. In other words, imposing preclusive effect would frustrate the legislative policy by "delaying the determination of benefit rights and burdening the unemployment compensation system." *Id.* At 378, 429 N.W.2d 169.

[10] 29 U.S.C. § 621 *et seq.*

common-law preclusion and thus preclusion applied, but instead considered whether there was any intent to be inferred from the statutory scheme.[11] Looking to the

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[11] In other words, the dispositive question is "whether a common-law rule of preclusion would be consistent with Congress' intent in enacting [the statute]." *Elliott, supra* 478 U.S. at 796, 106 S.Ct. at 3225. In *Elliott*, the Court found legislative intent indicating that preclusion should not apply in a racial discrimination claim under Title VII. Initially, the Court reviewed 42 U.S.C. § 2000e-5(b), which provided that the Equal Employment Opportunity Commission "must give 'substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local [employment discrimination] law.'" *Id.* At 795, 106 S.Ct. at 3224. The Court explained that "it would make little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court." *Id.* The Court then turned to its decision in *Chandler v. Roudebush*, 425 U.S. 840, 848, 96 S.Ct. 1949, 1953-1954, 48 L.Ed.2d 416 (1976), where the Court explained:

> "The legislative history of the 1972 amendments reinforces the plain meaning of the statute and confirms that Congress intended to accord federal employees the same right to a trial *de novo* [following administrative proceedings] as is enjoyed by private-sector employees and employees of state governments and political subdivisions under the amended Civil Rights Act of 1964." [*Elliott, supra* 478 U.S. at 795-796; 106 S.Ct. At 3224.]

Interestingly, the Age Act at issue in *Solimino* did not contain that provision. The *Solimino* Court explained this omission was immaterial because the "substantial weight" provision, like the filing requirements, both indicate and support the finding that preclusion should not apply. 501 U.S. at 112, 111 S.Ct. at 2172.

filing requirements of the statute, which required exhaustion of remedies with state authorities before filing in federal court, the Court held that there was congressional intent to abrogate preclusion principles. 501 U.S. at 111, 111 S.Ct. at 2171. The Court reasoned that the filing requirements "plainly assume the possibility of federal consideration after state agencies have finished theirs." *Id.*

B

Review the Civil Rights Act, there is nothing remotely similar to the provisions found dispositive of legislative intent in either *Storey* or *Solimino*. Section 606 merely provides: "An appeal before the circuit court shall be reviewed de novo." Clearly, the express intent presented by the provision in *Storey* is far from the instant provision providing that an *appeal* from the Civil *Rights* Commission "shall be reviewed de novo." The latter says nothing about use in later proceedings. The plain language simply contemplates an *appeal* from the Civil Rights Commission, but does not, by any stretch of the imagination, contemplate a new, original action in circuit court.

[9] Moreover, fact-specific holdings in federal decisions like *Solimino* are inapposite because the federal system requires exhaustion of administrative remedies before review in the courts. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 469, 102 S.Ct. 1883, 1891, 72 L.Ed.2d 262 (1982); Where exhaustion is required, granting preclusive effect to an agency decision

would undermine the role of the courts in the enforcement of laws prohibiting discriminatory treatment. Michigan law, on the other hand, clearly does not require exhaustion of administrative remedies before filing in circuit court.[12] See, e.g., *Pompey v. General Motors Corp.*, 385 Mich. 537, 558-560, 189 N.W.2d 243 (1971);[13] *Marsh v. Civil Service Dep't.*, 142 Mich. App. 557, 562-563, 370 N.W.2d 613 (1985).

The statutory provision at issue in *Solimino* confirms this difference. It mandates that a plaintiff first proceed in the state agency before filing in the courts. Accordingly, it creates a reasonable inference that preclusion rules should not apply. The same cannot be said with respect to the Michigan statute, however, It merely provides that *appeals* from the Civil Rights

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[12] In defining the scope of powers entrusted to the Civil Rights Commission, the people provided:

> Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state. [Const. 1963, art. 5 § 29.]

[13] Reviewing the constitutional convention records, *id.* at 559, n. 19, 189 N.W.2d 243, it becomes abundantly clear that the people intended to give a plaintiff the right to proceed directly to court without exhausting administrative remedies. However, neither the convention notes nor this Court's decision in *Pompey* give any indication that the preclusion doctrines would not apply. Hence, unlike the federal system where exhaustion rules apply, there is no intent, express or implied, that preclusion should not be employed.

Commission should be *reviewed* de novo. In other words, it provides guidance on *direct* appeal in circuit court and says nothing about filing a new, original action in circuit court after receiving full review in an administrative agency with a subsequent appeal and review in circuit court.

[10] The dissents would break new ground in Michigan law by countenancing a greater multiplicity of litigation[14] than was ever arguably intended by the Legislature.[15] However, the statutes at issue in both *Storey*

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[14] Justice Levin's opinion contends that granting preclusive effect to a Civil Service Commission decision might increase litigation because plaintiffs are likely to split their claims, whereas denying preclusive effect "might, in particular cases, actually conserve judicial resources." Op. At 267, 268 and 269. The opinion, however, fails to grasp the important concept of mutuality of estoppel. Estoppel must work both ways. See *Howell v. Vito's Trucking & Excavating Co.*, 386 Mich 37, 43, 191 N.W.2d 313 (1971). Our position will conserve resources by permitting a plaintiff to offensively use a favorable Civil Service Commission decision in circuit court to obtain damages or remedies not available before the commission. Justice Levin's view would require a plaintiff receiving a favorable ruling in the Civil Service Commission to relitigate the entire claim before reaching a damages or other remedy determination. Hence, our holding reduces the multiplicity of litigation, and Justice Levin's opinion actually serves to increase it.

[15] The dissents would also break new ground on an issue not raised in this Court by overruling *Walker v. Wolverine Fabricating & Mfg. Co., Inc.*, 425 Mich. 586, 391 N.W.2d 296 (1986), and holding that a proceeding de novo either on direct appeal from the agency or in a new original action is not limited to the record made before the

and *Solimino* do not support such an inferred intent analysis as is employed by Justice Mallett. Even if we were considering an action first begun in the Civil Rights Commission, it would be unreasonable to infer such intent from a statutory provision stating the standard of review in *appeal.* Indeed, without question a plaintiff beginning in the Civil Rights Commission and *appealing* to the circuit court, where he receives an adverse decision, would *not* be entitled to file a new original action in circuit court. Preclusion would certainly bar the action because there would be no legislative intent for this multiplicity of litigation and waste of judicial resources. The same should be true for claims beginning in the Civil Service Commission.[16]

C

The dissents cite briefly M.C.L. § 37.2803; M.S.A. § 3.548(803) and Const. 1963, art. 5, § 29, for support in finding that preclusion does not apply. Both the statute and the constitutional provisions employ the same

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agency. We elect not to express an opinion on an issue not before this Court.

[16] Justice Levin's opinion argues that we should limit our "holding to the facts of this case where grievances involving both a civil rights and a noncivil rights claim were filed." Op. At 268. Because this is the factual context in which this case is presented, we intimate only so far. We do not decide whether collateral estoppel could be applied under Justice Levin's hypothetical example. We save for another day that discussion.

language which, in effect, states that nothing in the constitution or the Civil Rights Act "shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state."

What the dissents fail to do is provide an analysis of the meaning of this clause. However, in *Pompey, supra*, this Court engaged in extensive analysis of its meaning and concluded that the clear intent of this provision was to permit claimants to seek relief in the courts without first exhausting administrative remedies. *Id.* at 558-560, n. 19, 189 N.W.2d 243.[17] In other words, the Civil Rights Commission does not have exclusive jurisdiction over discrimination claims, but instead has concurrent jurisdiction with the circuit courts. See also *Marsh, supra.*

Assuming this provision applies to the Civil Service Commission, imposing preclusion would not offend this

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[17] This amendment has been offered ...to give a basic right to any citizen to go to the courts of this state to try his own case. Any commission established could so set up their requirements that if they were drafted too loosely without basic thought behind them, I am afraid, the state would force an individual to through such a commission before his rights could be firmly established. They might exhaust the individual trying to secure his rights by saying that he must first exhaust their legal remedy. I think it is most vital that any person who feels that he has a cause of action be entitled to have his case tried in a court of this state immediately if he is ready to go, that we would always have this basic right of trial preserved to every citizen. [2 Official Record, Constitutional Convention 1961, p. 1946.]

clause or even implicate its prohibitions in this case.[18] The Civil Rights Commission, the Civil Service Commission, and the circuit court still have concurrent jurisdiction over discrimination claims. *Marsh, supra.* Plaintiff elected to adjudicate his claim to conclusion in the Civil Service Commission and lost. Once a tribunal of concurrent jurisdiction has rendered a decision on the merits, § 606 mandates that any subsequent relief would be in the form of appellate review.[19]

Hence, § 606, not § 803, answers the question whether "it is clear that the Legislature intended to make the determination final in the absence of an appeal." *Storey, supra* at 373, 429 N.W.2d 169. Reading § 803 in light of § 606, it is clear that the Legislature intended to make the Civil Rights Commission findings final in the absence of an appeal and, accordingly, also must have intended to make Civil Service Commission determinations final in the absence of an appeal.

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[18] Interestingly, Justice Levin relies on this Civil *Rights* Commission provision to support the proposition that a person receiving an adverse Civil *Service* Commission determination has a right to a new jury determination of the issue in circuit court. Op. At 269. Not only does the constitution not provide a similar provision for Civil *Service* Commission decisions, but the clear import of this section is only to allow for concurrent jurisdiction. Moreover, Justice Levin's position serves to overrule *Walker*, n. 15 *supra*, 391 N.W.2d 296, an issue not before this Court, with no explanation or analysis.

[19] Section 606 plainly provides that "*appeal[s* from] the [Civil Rights Commission] shall be reviewed de novo." (Emphasis added.)

Regardless of whether an appeal is taken, the Legislature has provided only one remedy from an adverse determination, i.e., direct appeal in the circuit court. An appeal by its very nature contemplates the possibility of reversal, but it certainly does not contemplate a new, original action. If the Legislature intended anything else, it would have said so more directly.

IV

Additionally, we reject the notion that 2 Restatement Judgments, 2d § 83, pp. 266-267, contemplates an abrogation of preclusion under the instant statutory scheme. In discussing the scope of the provision, the commentary indicates that this section would not apply "when a determination of an administrative tribunal is being subjected to direct judicial review." Comment a at 268. This is a logical conclusion given that "such a review is a continuation of the original administrative litigation and the final outcome is still in contest. The rules of res judicata do not foreclose the appellate contest, just as they do not prevent an appellate court from reversing a lower judicial tribunal." *Id.*

Certainly, the instant case technically fits within the scope of § 83 simply does not support such a finding. It is illogical to believe that a provision that would displace the situation from the scope of the rule could be used as the basis for finding a new, original action permissible.

The § 83 commentary[20] and its accompanying illustration confirm that § 83 is not controlling in this case. The example contemplates a statute which provides "the remedies provided under this statute *are in addition to all other remedies available to an affected employee or prospective employee.*" *Id.* (emphasis added). In this case, the operable provision provides that an appeal shall be reviewed de novo. Obviously, explicit cumulative remedies as presented in the sample, and de novo review on appeal, as is presented in this case, are not remotely similar. Accordingly, the legislative intent envisioned by § 83 is not satisfied in this case.

V

[11] The dissents appear to confuse the question directly presented to this Court. The question is not whether the standard of review on direct appeal should be de novo on the record instead of competent, material, and substantial evidence.[21] *Viculin, supra.* The question

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[20] The relevant commentary states that "[t]he statutory scheme may contemplate that the [subsequent] tribunal is required to make its own determination of the issue in question, even though the issue has been previously litigated in another forum." 2 Restatement Judgments, 2d § 83, comment h, p. 280.

[21] Indeed, it is not before this Court because plaintiff did not argue on appeal in the first circuit court action that a de novo standard applies, did not appeal that decision, and finally, did not make a similar contention in this Court. The dissents would provide this remedy despite the procedural posture of this case and despite the failure to directly present this question to this Court. In doing so,

is whether the Legislature intended to abrogate well-established preclusion doctrines when a plaintiff files a new, original action after adverse agency and circuit court decisions. Specifically, the point of contention centers on whether the Legislature intended a Civil Service Commission determination to be final in the absence of an appeal.[22] To this question, the answer is undoubtedly yes, the Legislature intended it to be final.

[12] There are numerous laws regarding discrimination, the most obvious of which is the constitution.[23] There, the framers saw fit to provide the Civil Service Commission with the authority to resolve discrimination claims occurring in state employment.[24] Desiring to extend this protection to private employment,

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the dissents would sanction an additional remedy for a plaintiff coming from the Civil Service Commission.

[22] It must be remembered that when searching for legislative intent, our judicial duty is simply "to construe the legislative will as we find it, without regard to our own views as to the wisdom or justice of the act." *McKibbin v. Corp & Securities Comm.*, 369 Mich. 69, 81, 119 N.W.2d 557 (1963).

[23] The Legislature is presumed to legislate with "knowledge of and regard to existing laws upon the same subject...." *Lenawee Co. Gas & Electric Co. V. City of Adrian*, 209 Mich. 52, 65, 176 N.W. 590 (1920).

[24] Const. 1963, art. 11, § 5, expressly mandates that "[n]o appointments, promotions, demotions or removals ... shall be made for religious, racial or partisan considerations."

the framers then created Const. 1963, art. 5, § 29, which created the Civil Rights Commission. In light of these provisions, it becomes clear that the delegates contemplated that two constitutionally created administrative bodies would hear similar discrimination claims. Against this backdrop, however, the delegates only provided de novo review for claims originating in the Civil Rights Commission.[25]

When the Legislature enacted the Civil Rights Act pursuant to the requirements set forth in Const. 1963, art. 1, § 2[26] and art. 5, § 29[27], it simply followed the procedures already existing under the constitution. Both the constitution and the Legislature provided that appeals from the Civil Rights Commission would be de novo,

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[25] See Const. 1963, art 5, § 29, which provides: "*Appeals* from final orders of the commission, including cease and desist orders and refusals to issue complaints, shall be tried de novo before the circuit court having jurisdiction provided by law." (Emphasis added.)

[26] No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. *The legislature shall implement this section by appropriate legislation.* [Emphasis added.]

[27] It shall be the duty of the commission *in a manner which may be prescribed by law to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution; and to secure the equal protection of such civil rights without such discrimination.* [Emphasis added.]

while also providing that parties have a direct and immediate right to remedies in the courts. Without changing the substance of that already provided as a constitutional right,[28] it must be presumed that the Legislature adopted the intent of the framers.[29] Reviewing the convention debate and the *plain language* of those provisions, the intent is simply as follows: Appeals from the Civil Rights Commission shall be de novo and the parties need not exhaust administrative remedies before proceeding to circuit court.[30]

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[28] See § 606.

[29] The intent that Justice Mallett says is present is, in reality, not an express or an implied intent to abrogate preclusion principle. Instead, the intent inferred from § 606 and § 803 was merely a restatement of the obvious, i.e., a recognition that the constitution already afforded these rights to discrimination claimants. In other words, even if the Legislature said nothing or for that matter, said the opposite of that already provided in the constitution, it would have no effect on the right to de novo review or the right to direct and immediate relief in circuit court. These rights were previously provided in Const. 1963, art 5, § 29, and the Legislature has no power to impede these constitutional rights. *Civil Rights Comm. V. Clark*, 390 Mich. 717, 726, 212 N.W.2d 912 (1973).

[30] As Justice Cooley explained long ago:

> Where the statute is plain and unambiguous in its terms, the courts have nothing to do but to obey it. They may give a sensible and reasonable interpretation to legislative expressions which are obscure, but they have no right to distort those which are clear and intelligible. The fair and natural import of the terms employed, in view of the subject

VI

Finally, we do not share the dissents' fears regarding the consequences preclusion could have on the Civil Service Commission. The dissents contend that preclusion would discourage claimants from filing before the Civil Service Commission in fear of losing the right to a remedy in the courts. In addition, Justice Mallett maintains that preclusion would create a greater incentive for the government to actively contest this claim, thereby "undermining the advantages of informality, cost, and speed in the resolution of such disputes in the administrative forum." Op. at 264.

The dissents appear to forget that a claimant has three forums to pursue a discrimination claim: the Civil Service Commission, the Civil Rights C omission, and the circuit court. Moreover, plaintiff has not asked this Court to alter the standard of review for discrimination claims arising in the Civil Service Commission.[31] In any event, unlike *Storey*, in which we considered preclusion in the

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matter of the law, is what should govern.

These rules are especially applicable to constitutions, for the people in passing upon them, do not examine their clauses with a view to discover a secret or a double meaning, but accept the most natural and obvious import of the words as the meaning designed to be conveyed. [*People ex rel Twitchell v. Blodgett*, 13 Mich. 127, 167-168 (1865).]

[31] See part V.

context of the MESC proceeding on unemployment benefits, the Civil Service Commission is not such a limited body. In fact, it is the constitutionally created agency designed to deal with *all* facets of state employment. If this creates the alleged consequences espoused by the dissents, the Legislature is the appropriate body to remedy this problem.

VII

We find that plaintiff is estopped from relitigating this discrimination claim in circuit court. With all the requirements of administrative estoppel being satisfied, including the intent to make the decision final in the absence of an appeal, we refuse to sanction a greater multiplicity of litigation than anything currently provided by statute or unnecessarily waste judicial resources. We reverse the decision of the Court of Appeals.

BRICKLEY, C.J., and WEAVER and BOYLE, JJ., concur.

MALLETT, Justice (*dissenting*).

We disagree with the majority and would hold that the doctrine of collateral estoppel does not apply to Civil Service Commission decisions because the Legislature intended the Civil Rights Act to abrogate the common-law rules of preclusion. Thus, we would affirm the decision of the Court of Appeals and allow the plaintiff to relitigate issues of discrimination in circuit court following a final determination by the Civil Service

Commission.

I

Generally, collateral estoppel applies to an administrative agency's final decision. *Lilienthal v. City of Wyandotte*, 286 Mich. 604, 282 N.W. 837 (1938), and *Storey v Meijer, Inc.* 431 Mich. 368, 372, 429 N.W.2d 169 (1988). The decision is "conclusive of the rights of the parties, or their privies, in all other actions or suits in the same or any other tribunal of concurrent jurisdiction on the points and matters in issue in the first proceeding." *Lilienthal, supra* at 616, 282 N.W. 837. However, each agency must be assessed separately, and no blanket statement regarding collateral estoppel can be made for all administrative agencies.[1]

In order to determine whether the plaintiff's action is barred by collateral estoppel, we must examine the Civil Service Commission's final decision in light of

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[1] Collateral estoppel is a judicial creation. *Howell v. Vito's Trucking & Excavating Co.*, 20 Mich. App. 140, 146, 173 N.W.2d 777 (1969). Its general purpose is to "strike a balance between the need to eliminate repetitious and needless litigation and the interest in affording litigants a full and fair adjudication of the issues involved in their claims." *Storey v. Meijer, Inc., supra* at 372, 429 N.W.2d 169; *Senior Accountants, Analysts & Appraisers Ass'n v. Detroit*, 399 Mich. 449, 457-458, 249 N.W.2d 121 (1976).

general collateral estoppel requirements[2] and the three-part test adopted in *Roman Cleanser Co. v. Murphy*, 386 Mich. 698, 703-704, 194 N.W.2d 704 (1972), and more recently applied in *Storey v. Meijer, Inc., supra*. The decision will be given preclusive effect if (1) the administrative determination is adjudicatory in nature, (2) there is a method of appeal, and (3) it is clear that the Legislature intended the agency decision to be final in the absence of an appeal. *Id.* At 373, 429 N.W.2d 169.

The first prong of the *Storey* test, assessing whether an administrative agency's determination is adjudicatory in nature, requires a comparison between the similarity of the agency's procedure and that of a court. 2 Restatement Judgments, 2d, § 83, comment b, p. 268; 2 Davis & Pierce, Administrative Law (3d ed), § 13.3, p. 250.

Like the majority, we do not contest that the commission's determination is adjudicatory in nature. The commission is a quasi-judicial administrative agency

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[2] The general requirements of collateral estoppel are set forth in 1 Restatement Judgments, 2d, § 27, p. 250, which states that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." This Restatement definition was adopted in *Senior Accountants v. Detroit, supra* at 458, 249 N.W.2d 121, but at that time it was defined in § 68 of the Restatement. The definition was moved to § 27 in the Second Restatement.

created by the constitution, and the specific determination is similar in numerous respects to that of a judicial proceeding. *Viculin v. Civil Service Dep't.*, 386 Mich. 375, 386, 192 N.W.2d 449 (1971), citing *People ex rel Clardy v. Balch*, 268 Mich. 196, 200, 255 N.W. 762 (1934), and *In re Fredericks*, 285 Mich. 262, 266, 280 N.W. 464 (1938). The employee has the right to be represented by counsel, and the commission has the authority to subpoena witnesses and require the production of documents. In addition, the employee has the right to examine and cross-examine witnesses, the employee the right to submit exhibits, and there is a definite point of finality in the proceedings. Although proceedings before the commission may not be as extensive as those employed by a court, the plaintiff filing a claim with the commission trades the rigidity of a judicial tribunal for the informality, simplicity, and rapidity of an administrative determination. There is no indication that the differences between a commission hearing and a judicial proceeding hinder the ability to present a discrimination claim.

The second prong of the *Storey* test requires that a method of appeal be available, but is not concerned with whether an appeal was taken. While an actual appeal is not necessary in order for an agency decision to be given preclusive effect,[3] the plaintiff in this case pursued his

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[3] 2 Restatement Judgments, 2d, § 83, comment a, pp. 267-268. Applying collateral estoppel to unappealed agency decisions is not a novel concept. In *Senior Accountants, supra* at 453, 249 N.W.2d

appeal. Again, we do not contest that the commission procedures satisfy this aspect of the test. The Michigan Constitution allows final commission decisions to be appealed to the circuit court. Const. 1963, art 6, § 28.

The critical issue disputed in this case is whether the commission's civil rights determination fulfills the third prong of the test; that is, whether the Legislature, in enacting the Civil Rights Act, intended to abrogate the traditional rules of preclusion.[4] Because the rules of

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121, we addressed whether an unappealed Employment Relations Commission decision collaterally estopped a subsequent action in circuit court. We held

> that plaintiffs are barred from suing for "damages" under a breach of contracttheory by the doctrine of collateral estoppel because the questions of fact necessary for determination of "damages" by the circuit court in this case would be identical to questions of fact already determined by the Michigan Employment Relations Commission in concluding "back pay" was improper in this case.

The requirement is that the plaintiff have the opportunity to appeal the decision, not whether the plaintiff takes advantage of the opportunity.

[4] When determining whether agency determinations preclude relitigation of civil rights claims in a federal judicial forum, the United States Supreme Court consistently examines the intent of Congress in enacting the specific legislation in question. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed., 2d 262 (1982); *Univ. Of Tennessee v. Elliott*, 478 U.S. 788, 106

preclusion are a judicial creation, *Howell v. Vito's Trucking & Excavating Co.*, 386 Mich. 37, 191 N.W.2d 313 (1971), *supra*, the presumption of preclusion will not apply"'when a statutory purpose to the contrary is evident.'" *Astoria Federal S. & L. Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S.Ct. 2166, 2170, 115 L.Ed.2d 96 (1991), quoting *Isbrandsten Co. v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952).

According to *Storey* and 2 Restatement Judgments, 2d § 83, collateral estoppel is not to be applied to administrative agency decisions if it conflicts with a legislative policy that permits a court to make an independent determination of an issue in a subsequent civil proceeding. *Storey* at 377, 429 N.W.2d 169. 2 Restatement judgments, 2d § 83(4), p. 267, provides:

> An adjudicative determination of an issue by an administrative tribunal does not preclude relitigation of that issue in another tribunal if according preclusive effect to determination of the issue would be incompatible with a legislative policy that:
>
> (a) The determination of the tribunal adjudicating the issue is not to be accorded conclusive effect in subsequent proceedings; or

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S.Ct. 3220, 92 L.Ed.2d 635 (1986); *Astoria Federal S. & L. Ass'n. v. Solimino*, 501 U.S. 104, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991).

> (b) The tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question.

We find that Civil Service Commission decisions are subject to this exception to the general rule of preclusion. Collateral estoppel does not apply to final decisions of the Civil Service Commission because the Legislature did not intend these determinations to be conclusive in subsequent civil litigation. Applying preclusive effect to these decisions is incompatible with legislative policy that allows a court to make an independent determination of the same issue. *Storey* at 377, 429 N.W.2d 169; 2 Restatement Judgments, 2d § 83.

II

Unlike the majority, we find that the Legislature intended to allow an independent determination in circuit court in the standard of review set forth in the Civil Rights Act. M.C.L. § 37.2606; M.S.A. § 3.548(606). Although the requirement set forth in the Civil Rights Act applies only to review of Civil Rights Commission determinations, we find no legislative intent to treat Civil Service Commission determinations differently.

The standard of review set forth in the Civil Rights Act indicates that the Legislature intended plaintiffs to have an independent review of their civil rights claims in a judicial forum. Section 696 of the act provides that "[a]n appeal before the circuit court shall be reviewed de

novo." M.C.L. § 37.2606; M.S.A. § 3.548(606).[5] Allowing a judicial proceeding when plaintiffs pursue their administrative remedy in the Civil Rights Commission,[6] but denying a similar treatment when plaintiffs seek adjudication by the Civil Service Commission violates the goals of the Civil Rights Act.

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[5] As recently explained by this Court, the term "de novo" means that "a circuit court, in reviewing a decision of the Civil Rights Commission, may substitute its assessment for the findings, conclusion, and decision of the Civil Rights Commission." *Civil Rights Dep't. ex rel Johnson v. Silver Dollar Cafe*, 441 Mich. 110, 116, 490 N.W.2d 337 (1992).

[6] Whether a previous decision of the Civil Rights Commission precludes a subsequent trial in a judicial forum is not before the Court and we do not decide the affect of a Civil Rights Commission determination. We do note, however, that a similar conflict will generally not arise when the Civil Rights Commission is the administrative agency because the commission has enacted an internal rule of procedure that requires plaintiffs to include in their complaint

> [a] statement as to any other proceeding, civil or criminal, based upon the same facts, occurrences, or transactions as alleged in the complaint, together with a statement as to the status or disposition of the other action. Where such a proceeding, the commission or department may, in its discretion, delay consideration or action on the complaint filed. [1979 AC, R 37.4(4)(c)]

Presumably, the Civil Rights Commission stays its proceedings and awaits the result in the other forum.

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The Civil Service Commission was created by the people of Michigan and has been in effect since January 1, 1941, through the enactment of art. 6, § 22 of the Constitution of 1908, now art. 11, § 5 of the current Michigan Constitution. This section provides:

> The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions and regulate all conditions of employment in the classified service. [Const. 1963, art 11, § 5.]

It is undisputed that the purpose of the amendment was to eliminate the "spoils system" and the politicization of state employment. The goal was to improve the state of the classified civil service through the efforts of a single agency. See *Council No. 11, AFSCME v. Civil Service Comm.*, 87 Mich. App. 420, 424, 274 N.W.2d 804 (1978) aff'd 408 Mich. 385, 292 N.W.2d 442 (1980); *Reed v. Civil Service Comm.*, 301 Mich. 137, 154-155, 3 N.W.2d 41 (1942); *Civil Rights Dep't. ex rel. Jones v. Civil Service Dep't.*, 101 Mich. App. 295, 301 N.W.2d 12 (1980).

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Although the Civil Rights Commission was created to end invidious forms of discrimination through the effort of a single agency, the Civil Rights Commission does not have exclusive jurisdiction over state employees' discrimination claims. As the Court of Appeals has correctly observed, the Civil Service Commission,[7] the Civil Rights Commission,[8] and the circuit court[9] have concurrent jurisdiction when a "state employee asserts a civil rights violation." *Walters v. Treasury Dep't.*, 148 Mich.App. 809, 816, 385 N.W.2d 695 (1986); *Marsh v. Civil Service Dep't.*, 142 Mich.App. 557, 370 N.W.2d 613 (1985).

Concurrent jurisdiction does not undermine the legislative goal of providing an independent determination in a judicial forum. An independent review is guaranteed in two of the three forums in which civil service employees can file a discrimination claim in the circuit court and review de novo of a Civil Rights Commission decision pursuant to M.C.L. § 27.2606; M.S.A. § 3.548(606).

Review of Civil Service Commission determinations, however, is governed by a more deferential standard. Civil Service Commission

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[7] Const. 1963, art. 11, § 5.

[8] M.C.L. §§ 37.2601-37.2605; M.S.A. §§ 3.548(601)-3.548(605).

[9] M.C.L. § 37.2801; M.S.A. § 3.548(801).

determinations are reviewed to determine if there is "competent, material and substantial evidence on the record as a whole[10] to support the commission's decision. *Viculin v. Civil Service Dep't., supra; Crider v. Michigan*, 110 Mich.App. 702, 313 N.W.2d 367 (1981). Thus, if we were to grant preclusive effect to a discrimination decision by the Civil Service Commission, plaintiffs who pursued their discrimination claims before the commission could never secure an independent determination in a judicial forum.

For these reasons, we would find that the Legislature did not intend such result, but rather intended to guarantee "the right of any party to direct an immediate legal or equitable remedies in the courts of this state." Const. 1963, art. 5, § 29; M.C.L. § 37.2803; M.S.A. § 3.548(803).

A

Treating the Civil Rights Commission and the Civil

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[10] Const. 1963, art. 6, § 28. As illustrated in comments of the constitutional drafters, the substantial evidence standard of review "is simply a review on the record made before the board of review or commission below. It is a summary proceeding...." 1 Official Record, Constitutional Convention 1961, p. 1466 (comments of Leibrand). As noted in *Michigan Employment Relations Comm. v. Detroit Symphony Orchestra, Inc.*, 393 Mich. 116, 124, 223 N.W.2d 283 (1974), "such a review does not attain the status of de novo review.... Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding...."

Service Commission differently is unsupported by the language or the intent of the Civil Rights Act. Civil service disputes often involve factors and considerations not present outside the civil service arena. In instances in which civil service employment presents unique constraints and obligations, the Civil Service Commission may be a better informed decision maker than either the courts or other administrative agencies that are not familiar with civil service employment.

We do not, however, find discrimination to be such a situation. Discrimination is discrimination, whether in the civil service arena or in the private sector. While the Civil Service Commission is undoubtedly frequently required to determine whether discrimination has occurred in state employment, we are unable to conclude that it has special knowledge or expertise requiring greater deference to its determinations that of the Civil Rights Commission. To the contrary, it would be anomalous to give greater deference to the determination of the Civil Service Commission with regard to discrimination issues, an agency that only addresses discrimination as one facet of its jurisdiction,[11] than to the Civil Rights Commission, the agency expressly

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[11] It is undisputed that the civil service system was established to put an end to the evils of the "spoils system" which had politicized all levels of state government. The goal of the amendment was to improve the classified civil service by the adoption of a merit system. [*Council No. 11, AFSCME, supra* at 424, 274 N.W.2d 804, citing *Reed v. Civil Service Comm., supra* at 154-155, 3 N.W.2d 41.]

created to remedy discriminatory treatment.[12]

We conclude that because a determination by the primary agency vested with eliminating discrimination dopes not preclude an independent determination in a judicial forum, neither should the determination of the Civil Service Commission.

Civil rights claims have consistently been treated differently than other employment claims. While the Civil Service Commission possesses "plenary power" to determine the procedures by which "a state civil service employee may review his grievance,"[13] including claims arising under the Civil Rights Act,[14] denying preclusive

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[12] The Civil Rights Act "is aimed at 'the prejudices and biases' borne against persons because of their membership in a certain class...and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases." *Miller v. C.A. Muer Corp.*, 420 Mich. 355, 363, 362 N.W.2d 650 (1984) (citations omitted).

[13] *Viculin* at 393, 192 N.W.2d 449.

[14] The classified civil service is not exempted from legislation prohibiting discrimination and securing civil rights in employment. Thus the Elliott-Larsen and Handicappers' Civil Rights Acts apply to employees of the classified civil service, and the Civil Rights Commission and circuit court have jurisdiction over the discrimination claims of aggrieved employees. [*Marsh, supra* at 569, 370 N.W.2d 613.]

We express no opinion regarding the intent of the Legislature in enacting the Handicappers' Civil Rights Act or the preclusive effect of a Civil Service Commission determination of an

effect to the Civil Service Commission discrimination determination recognizes the unique nature of a discrimination claim and fulfills the intent of the Legislature to provide an independent determination in a judicial forum.

B

Lastly, our conclusion is further justified by the consequences that would follow from barring the plaintiff from receiving an independent determination by the circuit court. Civil service employees are not required to exhaust their administrative remedies before filing a civil rights claim directly in circuit court.[15] However, plaintiffs should not be discouraged from pursuing an administrative remedy that offers the advantage of resolving disputes more quickly and with less expense than similar judicial proceedings. We tacitly acknowledged this concern in *Storey* when we noted that granting preclusive effect to determinations of the Employment Security Commission would entail a

> substantial risk that the potential application of collateral estoppel will cause

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issue covered by that act. M.C.L. § 37.1101 *et seq.*; M.S.A. § 3.550(101) *et seq.*

[15] *Marsh, supra* at 562, 370 N.W.2d 613, *Walters, supra* at 816, 385 N.W.2d 695.

> a qualified claimant to forego a claim for unemployment compensation in order to protect the right to pursue a civil claim with its full range of benefits. [*Id.* at 378, 429 N.W.2d 169.]

Likewise, were we to adopt the defendant's argument here, civil service employees, in order to avoid the preclusive effect of an adverse Civil Service Commission determination, would be encouraged to forego proceedings before the commission in order to preserve an independent determination in a judicial forum.

As we also recognized in *Storey*, "[d]ue to the full range of remedies available in a civil action, the parties have a greater incentive to fully litigate the civil claim than the claim for unemployment benefits." *Id.* At 378, 429 N.W.2d 169. The same incentives are present in proceedings before the Civil Service Commission.[16] Fearful of an adverse determination, the defendant employer would have a strong incentive to contest discrimination in all Civil Service Commission proceedings because a victorious plaintiff would be able

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[16] We have traditionally required mutuality of estoppel for collateral estoppel to apply. *Lichon v. American Universal Ins. Co.*, 435 Mich. 408, 428, 459 N.W.2d 288 (1990); *Storey* at 373, n 3, 429 N.W.2d 169; *Howell v. Vito's Trucking Co.*, n. 1 *supra* at 43, 191 N.W.2d 313. 'The estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him.'"

to offensively assert the determination of the commission in circuit court and recover damages that the commission does not have the authority to award. Thus, application of collateral estoppel would encourage exhaustive contests of discrimination claims, undermining the advantages of informality, cost and speed in the resolution of such disputes in the administrative forum.

III

In enacting the Civil Rights Act, the Legislature sought to ensure an independent determination in a judicial forum. An independent determination cannot be guaranteed if preclusive effect is granted to the previous Civil Service Commission discrimination determination.

We would hold that the Legislature intended to eliminate the preclusive effects of the Civil Service Commission determination. For this reason, we would affirm the decision of the Court of Appeals and would hold that a final determination by the Civil Service Commission does not preclude the plaintiff from relitigating the same issues in circuit court.

MICHAEL F. CAVANAGH, J. concurs.

LEVIN, Justice (*dissenting*).

David Nummer was transferred from one unit of the Department of Treasury to another. He filed a grievance with the Civil Service Commission, claiming that the transfer breached an enforceable promise and

constituted an affirmative action program that violated civil service rules mandating merit selection and barring sex and race discrimination. The hearing officer and, on review, the Civil Service Commission, found that there was no probative evidence of an enforceable promise, and that the transfer was for "legitimate business considerations." The circuit court affirmed.

Nummer had by then commenced this action in the circuit court, claiming that his civil rights were violated. The Court of Appeals, reversing the decision of the circuit court, held that this action was not precluded by the decision of the Civil Service Commission.[1] The majority reverses, concluding that the doctrine of collateral estoppel precludes this action.

I agree with the majority that ordinarily the decision of an administrative tribunal regarding a factual issue,[2] following an adjudicative hearing, bars a party from seeking a contrary finding in a civil action involving another party to the administrative proceeding.[3]

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[1] 200 Mich. App. 695, 504 N.W.2d 724 (1993).

[2] Or a legal issue.

[3] When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. [1 Restatement Judgments, 2d § 27, p. 250.]

There are, however, a number of factors – see parts II through VI – that distinguish this case from other cases in which relitigation of a factual issue might be sought. Having in mind that the doctrine of collateral estoppel is not ordained by statute, but is a judicial creation, those distinguishing factors justify, in my opinion, recognizing an exception permitting relitigation of the issues of sex and race discrimination.

I

David Nummer pursued a grievance before the Civil Service Commission, claiming that his transfer from the Tax Fraud Division to the Discovery Division of the Treasury Department violated an enforceable promise made by department officials that he would continue in the Tax Fraud Division in a combined position of investigator and auditor. He also claimed that he was transferred because he is a white male, in violation of the civil service rule requiring that personnel decisions be made on the basis of merit,[4] and the constitutional

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[4] All appointments and promotions to positions in the classified service and all measures for the control and regulation of employment in such positions, and separation therefrom, shall be based on merit, efficiency and fitness. [Civil Service Commission Rule 1-1.1.]

provision[5] and Civil Service rule.[6] Barring transfers in the classified service for racial (and by rule, sexual) considerations.

The hearing officer found that there was "no probative evidence to establish that a valid and enforceable promise was made to Nummer that he would continue to work either as a criminal investigator or that he would remain – throughout his government service – in [the Tax Fraud Division]." The hearing officer also found that "[t]he transfer was motivated by legitimate business considerations."[7]

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[5] No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations. [Const. 1963, art 11, § 5.]

[6] Conditions. – No person shall be discriminated against in seeking employment, in being appointed or promoted, or in any condition of employment, in the classified service, or any separation therefrom, because of race, color, religion, national origin, ancestry, handicap, partisan considerations, age or sex. Age or sex may be determined to a bona fide occupational qualification. [Civil Service Commission Rule 1-2.1.]

[7] On the matter of discrimination, the claim is that auditors are white males and that most of the persons hired as regulation agents are from minority groups – women and persons of color. Grievant relies on this single fact to establish his claim. It is not sufficient to do so! The transfer was motivated by legitimate business considerations. I find that Grievant has not overcome this fact in his proofs. That the auditors were all men and that mostly women and other minorities replaced them is largely irrelevant because of the differing levels of the two classifications. In addition, the eligibility

The Employment Relations Board of the Civil Service Commission denied leave to appeal.[8] The Civil Service Commission reviewed and approved the decision of the Employment Relations Board.[9]

The circuit court, on appeal from the Civil Service Commission, found that there was competent, material, and substantial evidence on the whole record to support the hearing officer's findings, and affirmed.[10] Nummer did not seek leave to appeal the circuit court's decision to the Court of Appeals.

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pool from which the regulation agents were selected was made up primarily of minority persons and this, not discrimination, is the reason for the staffing.

DECISION

The Department of Treasury's transfer of David A. Nummer from its Tax Fraud to its Discovery Division was based exclusively on business considerations. As such, the transfer did not violate either the Merit Principles, Section 1-1.1 or Section 1-2.1 of the Civil Service Rules. Therefore, the grievance is dismissed. The grievance decision is dated June 14, 1988, mailed June 17, 1988.

[8] The matter was considered at a board conference on November 7, 1988, mailed November 9, 1988. The board said: "Leave to appeal is denied because the Board concludes that no meritorious basis for an appeal of the Grievance Hearing Officer's Decision has been shown by Appellant."

[9] The mailing date was January 20, 1989.

[10] The opinion of the circuit judge is dated January 5, 1990.

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Nummer commenced this action[11] pursuant to § 801 (art. 8) of the Civil Rights Act,[12] claiming that in January, 1987, he, and the other seven auditors, all of whom were white males, in the Tax Fraud Division, were summarily transferred to the newly formed Discovery Division, and that they were replaced by twenty "regulation agents," only four of whom were white males.

Nummer further alleged that the primary objective of the reorganization was "the achievement of certain affirmative action goals which goals could only be accomplished by disenfranchising those employees currently in certain lines of progression, and in particular, your Plaintiff; this has the effect of depriving Plaintiff of his position because he was and is a white male." Nummer claimed that the transfer violated his constitutional right to be free of discrimination because of race or color,[13] his rights under the constitutional provision establishing the Civil Rights Commission,[14] and his right to be free of discrimination based on sex and race in the terms and conditions of his employment

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[11] On December 12, 1989.

[12] A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both. [M.C.L. § 37.2801(1); M.S.A. § 3.548(801)(1).]

[13] Const. 1963, art. 1, § 2.

[14] Const. 1963, art. 5, § 29.

under the Civil Rights Act.[15] The complaint also alleged that the transfer breached an enforceable promise.

The circuit judge granted summary disposition because the decision of the Civil Service Commission "requires dismissal due to collateral estoppel...." The Court of Appeals reversed,[16] stating:

> It is clear that in enacting the Civil Rights Act, the Legislature chose to set aside the principles of collateral estoppel in civil rights cases and to countenance a multiplicity of litigation. As provided by the statutory scheme, the Legislature intended to permit civil rights litigants to have "two bites of the apple," even if two separate proceedings reach opposite results or engender repetitious and perhaps needless litigation in violation of the principles of collateral estoppel. As this Court noted in *Walters [v. Dep't. Of Treasury*, 148 Mich.App. 809, 819, 385 N.W.2d 695 (1986)], quoting *Pompey v. General Motors Corp.*, 385 Mich 537, 560, 189 N.W.2d 243 (1971), a civil action for the redress of a violation of a civil rights statute may be pursued in addition to "'the

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[15] M.C.L. § 37.2201 *et seq.*; M.S.A. § 3.548(201) *et seq.*

[16] 200 Mich.App. at 700, 504 N.W.2d 724.

> remedial [administrative] machinery provided by statute.'" Thus, a plaintiff whose civil rights claim is denied by the Civil Service Commission may file an original action in the circuit court, which may conclude otherwise and award injunctive relief or damages, including costs and reasonable attorney fees.

The Court of Appeals affirmed the circuit court's grant of summary disposition in favor of the department respecting Nummer's breach of an enforceable promise claim, but reversed regarding his race and sex discrimination claims under the Civil Rights Act, and remanded the case for further proceedings regarding those claims only.

II

In a circuit court civil rights action, in contrast with a Civil Service Commission proceeding, the parties have a right to a jury (or judge) determination of the factual issues.[17]

The administrative hearing and decision-making

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[17] In *Marsh v. Dep't. of Civil Service,* 142 Mich.App. 557, 569, 370 N.W.2d 613 (1985), and earlier and later cases, the Court of Appeals held and recognized that there is a right to a jury trial in an action brought pursuant to § 801 of the Civil Rights Act. See n 12 for text of § 801.

process, while adjudicatory, is informal and expedited, in contrast with the formal and deliberative proceedings in a circuit court trial.

A new determination by a circuit court jury of the issue of sex and race discrimination, decided against Nummer by the Civil Service Commission, would thus, as set forth in the Restatement of Judgments, be "warranted by differences in the quality or extensiveness of the procedures followed in" circuit court as compared to those followed in a Civil Service Commission administrative proceeding.[18]

III

This is not a case in which the litigant seeking to relitigate an adverse decision by an administrative

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[18] Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

* * * * *

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them.... [1 Restatement Judgments, 2d, § 28, p 273.]

Cf. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959); *Meeker v. Ambassador Oil Corp.*, 375 U.S. 160, 84 S.Ct. 273, 11 L.Ed.2d 261 (1963); *People v. Demery*, 104 Cal.App.3d 548, 560-561. 163 Cal.Rptr. 814 (1980); *State Farm Fire & Casualty Co. v. Emde*, 706 S.W.2d 543, 546 (Mo.App., 1986).

tribunal could have obtained an adjudication of all his claims in a circuit court action. A state civil servant in the classified service cannot, in a circuit court action asserting that his civil rights have been violated, join claims seeking redress for violation of his civil service rights.

Nummer's claims that his transfer from the Tax Fraud Division to the Discovery Division of the Treasury Department violated an enforceable promise, and also violated a rule requiring that personnel decisions be made on the basis of merit, could only be advanced before the Civil Service Commission, and could not have been advanced in circuit court.[19] The third strand of his complaint, the civil rights claim, alone can be advanced in circuit court.[20]

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[19] See *Norris v. Liquor Control Comm.*, 342 Mich 378, 381, 70 N.W.2d 761 (1955).

Even if Nummer could have asserted a claim for damages due to breach of enforceable promise and violation of the merit rule in the Court of Claims, he probably would have been required to exhaust his administrative remedies before the Civil Service Commission before commencing an action in the Court of Claims. See *Bays v. Dep't. of State Police*, 89 Mich.App. 356, 359-360, 280 N.W.2d 526 (1979).

In all events, Nummer had a right under the civil service rules to file a grievance with the Civil Service Commission respecting his breach of enforceable promise claim, and to a hearing thereon.

[20] I agree with the majority that, as held in *Marsh*, n. 17 *supra*, pp. 562-563, 370 N.W.2d 613, Michigan law "does not require

A state civil servant will generally conclude that he is more likely to prevail on a civil rights claim in a circuit court civil rights action than before the Civil Service Commission. Today's decision – precluding a circuit court civil rights action following a Civil Service Commission hearing on a civil rights grievance – will generally result in state civil servants splitting their claims of civil rights and noncivil rights grievances. The state civil servant henceforth will not file a grievance involving a civil rights claim before the Civil Service Commission, and will file in circuit court,[21] resulting in litigation before the Civil Service Commission of noncivil rights grievances and in the circuit court of civil rights claims, thus assuring the multiplicity of litigation that the doctrine of collateral estoppel seeks to discourage.[22]

IV

In some cases, including this case, the factual predicate of a state civil servant's noncivil rights grievance may so relate to the factual predicate of his civil rights

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exhaustion of administrative remedies before filing [a civil rights action] in circuit court." Op., p. 255.

[21] Or possibly with the Civil Rights Commission.

[22] As stated by the majority, according preclusive effect to administrative fact finding serves the parties "interest in avoiding costly and repetitive litigations, as well as preserving judicial resources." (Op., p. 253, citing *Univ. of Tennessee v. Elliott*, 478 U.S. 788, 798, 106 S.Ct. 3220, 3225-3226, 92 L.Ed.2d 635 [1986].)

grievance that a Civil Service Commission hearing officer's findings on the noncivil rights grievance may decide factual issues central to a circuit court civil rights action. Where that might occur, a well-informed and advised civil servant henceforth must choose whether to forgo, by not grieving his noncivil rights claims – in order to protect his civil rights claim against an adverse finding by a Civil Service Commission hearing officer on an issue central to a circuit court civil rights action – or run the risk of such an adverse finding by filing a grievance regarding his noncivil rights claims.

Even if Nummer had "chosen" to forgo filing a grievance with the Civil Service Commission respecting violation of his civil rights, application of conventional collateral estoppel doctrine would nevertheless bar his circuit court civil rights action. The Civil Service Commission's finding that he had been transferred for "legitimate business considerations" – thus rejecting his merit selection grievance – would ordinarily preclude relitigation of the bona fides of the reasons for the transfer in the circuit court civil rights action.

V

While the majority's conclusion that the circuit court civil rights action is precluded by the doctrine of collateral estoppel might be read as limited to a case, such as this, in which the claim of discrimination was raised before the Civil Service Commission and there was a finding that the claim of discrimination was not meritorious, it no doubt would be contended in another

case that, although no claim of discrimination had been presented before the Civil Service Commission, factual findings in the Civil Service Commission proceeding preclude relitigation of the issue of the reason for the transfer.

Preclusion is a judicially created doctrine that serves to eliminate redundant litigation. It should not be extended to a case in which the litigation is not redundant.

A state civil servant who has both a civil rights grievance and a noncivil rights grievance should be able to seek a Civil Service Commission hearing of his noncivil rights grievance without running the risk that the decision of that claim will preclude a circuit court civil rights claim even if the employee does not file a grievance regarding his civil service discrimination claim.

The majority should limit its holding to the facts of this case where grievances involving both a civil rights and a noncivil rights claim were filed. The majority should, I believe, add that where a grievance does not involve a civil service discrimination claim, a finding regarding another claim will not preclude a civil rights action. To fail to do so may mean that a person employed in the state classified service will be constrained from filing legitimate nondiscrimination grievances, lest an adverse determination foreclose a civil rights action.

Neither judicial economy nor the doctrine of collateral estoppel inexorably requires this Court to

conclude that the needs of judicial economy outweigh the needs and rights of persons in the state classified service to exercise their civil service grievance hearing rights without potentially sacrificing their rights and readies under the Civil Rights Act.

VI

Applying the conventional collateral estoppel doctrine in this case charging sex and race discrimination means that a state civil servant who protests, here a transfer, in another case, discipline, on any basis – whether on the basis of violation of civil rights or violation of other rights – runs the risk of a factual finding that may bar his civil rights action. A state civil servant who wishes to preserve his right to a jury determination in a circuit court civil rights action of his claims of sex or race discrimination must forgo filing a grievance before the Civil Service Commission regarding any issue that might result in a finding that the action taken by the department was for bona fide reasons.

It is a feature of civil rights litigation that a person claiming a violation of his civil rights has a multiplicity of remedies.[23] That is a constitutional and legislative choice annoying to some, but a choice that this Court should honor by denying preclusion of a circuit court action where there were sound reasons for first seeking

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[23] Const. 1963, art. 5, § 29; M.C.L. § 37.2101 *et seq.*; M.S.A. § 3.548(101) *et seq.*

administrative relief.

Neither the framers of the constitution nor the Legislature intended that an employee in the state civil service would be put to such an election of which right to assert, and constrained to forgo one right to protect another.

The framers of the constitution, in providing for the plenary power of the Civil Service Commission,[24] and the Legislature, in providing for a circuit court civil rights action, did not intend to preclude a state civil servant who unsuccessfully pursued a grievance involving a civil rights violation before the Civil Service Commission from obtaining a jury determination of the civil rights claim in legal action expressly preserved by the constitution to all citizens.[25]

The policies underlying the judicially created doctrines of collateral estoppel and preclusion do not require that those doctrines be applied so rigidly as to

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[24] Const. 1963, art. 11, § 5; *Viculin v. Dep't. of Civil Service*, 386 Mich. 375, 192 N.W.2d 449 (1971).

[25] Const. 1963, art. 5, § 29, establishing the Civil Rights Commission, provides:

> Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state.

force such an election of which right to assert and which right to abandon to protect the other right. The policies, protective of the civil service rights of state employees and of the civil rights of all citizens, as expressed in the constitution, and protective of civil rights, as expressed in the statutes, oblige us to protect both a state employee's civil service grievance rights *and* his circuit court civil rights cause of action.

Because a transfer in violation of a state civil servant's civil rights would also be grievable before the Civil Service Commission, a civil servant claiming that his transfer was discriminatory should be encouraged to advance that claim before a Civil Service Commission, a civil servant claiming that his transfer was discriminatory should be encouraged to advance that claim before a Civil Service Commission hearing officer at the same time he advances his noncivil rights grievances so that the hearing officer has all the claims before him and can review all the evidence, and make a decision on all the claims.

A circuit court civil rights action is not "repetitive" or unnecessarily duplicative of a civil service hearing. A civil service hearing was required to provide Nummer with an opportunity to present his breach of enforceable promise and merit rule grievances. Permitting plaintiffs like Nummer to raise the civil rights issue before the Civil Service Commission without risking preclusion of a circuit court civil rights claim might, in particular cases, actually conserve judicial resources. A proceeding before the Civil Service Commission ordinarily moves more speedily than a circuit court civil rights action, and

provides an opportunity for mediation and rectification of an employee's grievance that might avoid unnecessary litigation. Providing such an opportunity is in the public interest, the interest of the Civil Service Commission, the department of state government for which the civil servant works, and the civil servant.

The public interest in preserving the efficacy of Civil Service Commission hearings as a means of protecting civil servants and the administration of state government from untoward action by a state governmental official militates against applying the doctrine of collateral estoppel in a manner that will tend to eliminate Civil Service Commission hearings respecting employee complaints regarding transfers or discipline in any case in which the employee may wish to preserve for adjudication by a jury in circuit court claims of sex, race, or other discrimination.

VII

The majority's assertion that had Nummer complained to the Civil Rights Commission and appealed to the circuit court, a § 801 circuit court civil rights action would be precluded by an adverse decision in the circuit court,[26] ignores that the claimant is not ordinarily a party

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[26] *Id.* Op., p. 256.

in a Civil Rights Commission proceeding[27] and ordinarily is not represented by separate counsel.[28]

The majority references no decision of the Court of Appeals in which a party sought to retry in a circuit court civil rights action issues decided on the merits by the Civil Rights Commission and affirmed or reversed on appeal in the circuit court. There may be no such case simply because the Civil Rights Commission takes relatively few cases to formal hearing, and when it does, the complainant may generally prevail or accept an adverse determination following a full hearing on the merits and a determination de novo on appeal to the circuit court.

Such a scenario cannot be compared to adjudication of a civil rights claim by a civil service

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[27] But see 1 Restatement Judgments, 2d, § 41(d), p. 393 stating that a person who is not a party, but who is represented by a party is bound as though he were a party and that a person is represented by a party who is an official "invested by law with authority to represent the person's interests," and comment d, p. 397.

Under the circumstance that the claimant may maintain a separate circuit court civil rights action, it is at least unresolved whether the Civil Rights Commission or the attorney general may represent a claimant if the effect might or would be to preclude maintenance of a separate circuit court action.

[28] See, e.g., n. 36, where an action commenced before the Civil Rights Commission was styled *Dep't. of Civil Rights ex rel. Johnson v. Silver Dollar Cafe*, 441 Mich. 110, 490 N.W.2d 337 (1992).

hearing officer, one page affirmances by the Employment Board and the Civil Service Commission, and further review by the circuit court under the deferential reviewing standard requiring that the commission's decision be affirmed if supported by competent, material, and substantial evidence on the whole record.[29]

In *Walker v. Wolverine Fabricating & Mfg. Co., Inc.*, 425 Mich. 586, 391 N.W.2d 296 (1986), the complainant appealed from a decision of the Civil Rights Commission dismissing his complaint after finding that there were not sufficient grounds to issue a charge. It is one thing to construe the constitutional provision, "appeals [from the Civil Rights Commission] shall be tried de novo,"[30] as not permitting expansion of the record *on appeal* where the issue is whether the Civil Rights Commission properly declined to bring a charge, and, thus, to decide the merits. It would be quite another to construe that constitutional provision where the circuit court reviews a decision by the Civil Rights Commission *on the merits*.

An appeal (under article 6 of the Civil Rights Act) from the Civil Rights Commission truly tried de novo in circuit court on the merits, with a full record made by counsel for the complainant, probably would preclude a circuit court action brought in the claimant's name under

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[29] Const. 1963, art. 6, § 28; *Viculin*, n. 24 *supra*, 192 N.W.2d 449.

[30] Const. 1963, art. 5, § 29.

§ 801 (article 8 of the Civil Rights Act), especially if it was the claimant who appealed from the Civil Rights Commission to the circuit court.[31]

VIII

The majority states that "review under a competent, material, and substantial evidence standard" "is not 'on the merits.'"[32] Although such appellate review is not de novo, it is nevertheless supposed to be a search of the record and a review to determine whether there is the requisite evidentiary support for the decision "on the merits."

IX

The majority states that the framers of the constitution of 1963 desired, as set forth in art. 5, § 29, to extend to "private employment"[33] the protection provided in the civil service provisions of the constitution against discrimination.[34] This is inconsistent with recognition that there is no need for a state civil service

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[31] M.C.L. § 37.2606; M.S.A. § 3.548(606).

[32] Op., p. 254 and n. 8.

[33] Op. P. 258.

[34] Const. 1963, art. 11, § 5.

employee to exhaust his administrative remedies[35] – he can proceed under the Civil Rights directly in the circuit court which, thus, provides remedies not limited to "private employment."

There are a large number of governmental employees who are not in the state classified civil service: state employees who are excepted from the classified state civil service, and county, city, and township employees, all of whom are covered by the Civil Rights Act.

X

The following statement appears on p. 262 of the dissenting opinion:

> The standard of review set forth in the Civil Rights Act indicates that the Legislature intended plaintiffs to have an independent review of their civil rights claims in a judicial forum. Section 606 of the act provides that "[a]n appeal before the circuit court shall be reviewed de novo." MCL 37.2606; MSA 3.548(606). Allowing a judicial proceeding when plaintiffs pursue their administrative remedy in the Civil Rights Commission, but denying a similar treatment when plaintiffs seek adjudication

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[35] See n. 20.

by the Civil Service Commission violates the goals of the Civil Rights Act.

The discussion of § 606 (article 6) as the source of the right to an "independent determination" overlooks that § 606 concerns only an appeal from the Civil Rights Commission. The source of the right to maintain this separate action in circuit court is not § 606 in article 6, but article 8.

The Civil Rights Act provides, in article 6, for the filing of a complaint with the Civil Rights Commission and for an appeal from its decision to the circuit court, which shall *review* the decision of the commission *de novo*.[36]

The Civil Rights Act further provides, in article 8, that a person alleging a violation of the Civil Rights Act may bring a civil action for damages in the circuit court, and recover, as part of his damages, reasonable attorneys

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[36] M.C.L. § 37.2605; M.S.A. § 3.548(605).

An appeal before the circuit court shall be reviewed *de novo*. M.C.L. § 37.2606; M.S.A. § 3.548(606).

In *Dep't. of Civil Rights ex rel Johnson v. Silver Dollar Cafe*, n. 28 *supra*, 490 N.W.2d 337, this Court held that the Court of Appeals reviews the judgment of the circuit court reviewing a decision of the Civil Rights Commission under the clearly erroneous standard.

fees.[37]

This action *does not seek appellate review* by the circuit court of a decision of the Civil Rights Commission. (Nor does this action seek appellate review by the circuit court of a decision of the Civil Service Commission.) This is a separate, original circuit court action commenced pursuant to article 8, and cannot properly be analogized to an article 6 action seeking appellate review by the circuit court of a decision of the Civil Rights Commission.

An article 8 action is triable by a jury. In *Marsh*, as here, the plaintiff filed an article 8 action in the circuit court claiming that the Department of Civil Service and the Treasury Department unlawfully discriminated on the basis of sex and race.[38] The record to be made in an

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[37] M.C.L. § 37.2801; M.S.A. § 3.548(801).

[38] The Court of Appeals also ruled:

> Jurisdiction of the Civil Rights Commission and the circuit court over civil rights claims is concurrent, and an aggrieved individual may proceed simultaneously in both forums.
>
> * * * * *
>
> The classified civil service is not exempted from legislation prohibiting discrimination and securing civil rights in employment. Thus the Elliott-Larsen and Handicappers' Civil Rights Acts apply to employees of the classified civil service, and the Civil Rights Commission and circuit court have

action triable before a jury is not limited, and cannot be limited, by the record made before another tribunal such as the Civil Rights Commission.

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jurisdiction over discrimination claims of aggrieved employees. [*Marsh*, n. 17 *supra*, pp. 563-569, 370 N.W.2d 613.]

## APPENDIX H

Received June 14, 1995

Michigan Supreme Court
Lansing, Michigan

**Order**
Entered: June 13, 1995

James H. Brickley
Chief Justice

Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

Rehearing No. 335

| | | |
|---|---|---|
| DAVID NUMMER, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | SC 97343 |
| | ) | CoA 139570 |
| v | ) | LC 8-65138-CL |
| | ) | |
| MICHIGAN DEPARTMENT OF TREASURY | ) | ORDER |
| Defendant-Appellant. | ) | |

In this cause, a motion for rehearing is considered, and it is hereby DENIED.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 13, 1995 /s/
Clerk

## APPENDIX I

Michigan Supreme Court

Lansing, Michigan

Received July 26, 1995

James H. Brickley
Chief Justice

Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

**Order**
Entered: July 25, 1995

Rehearing No. 335

| | | |
|---|---|---|
| DAVID NUMMER, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | SC 97343 |
| | ) | CoA 139570 |
| v | ) | LC 8-65138-CL |
| | ) | |
| MICHIGAN | ) | ORDER |
| DEPARTMENT OF | ) | |
| TREASURY | ) | |
| Defendant-Appellant. | ) | |

AMENDMENT TO ORDER

On order of the Court, the order of June 13, 1995 is amended to correct a clerical error by adding, after the text thereof, the following:

"Levin, Cavanagh and Mallett JJ., would grant rehearing."

I CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 25, 1995 /s/
Clerk

## APPENDIX J

STATE OF MICHIGAN
IN THE COUNTY OF INGHAM

| | | |
|---|---|---|
| DAVID NUMMER, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs | ) | 89-65138-CL |
| | ) | |
| MICHIGAN | ) | |
| DEPARTMENT OF | ) | **COMPLAINT** |
| TREASURY, | ) | |
| | ) | |
| Defendant. | ) | |

COMPLAINT

NOW COMES Plaintiff, by and through his attorneys, Green and Green, and in complaining against the Defendant, avers and alleges as follows:

(Jurisdiction and Venue)

1. Plaintiff is a resident of the State of Michigan, County of Ingham.

2. Defendant Michigan Department of Treasury is and was at all times material the employer of Plaintiff.

3. Each of the Defendants is a State Agency and a person for purposes of this litigation.

4. Plaintiff is employed by the Defendant Department of Treasury.

(Common allegations)

5. Plaintiff commenced employment with the Department of Treasury in 1970 as an auditor.

6. In 1978 Plaintiff was assigned to the Intelligence Unit.

7. In 1980 the Intelligence Unit was combined with two other operations and became known as a Special Investigation Division (SID), and was later renamed the Tax Fraud Division (TFD).

8. Plaintiff worked in the TFD until January of 1987, when all white male auditors in the TFD were transferred by the Department of Treasury to the newly formed Discovery Division.

9. During his tenure with the SID and TFD, Plaintiff audited the accounting and financial records of businesses and individuals in connection with investigations of criminal activity.

10. Plaintiff's civil service classification was that of auditor, however, Plaintiff's auditing responsibilities were exercised exclusively in connection with criminal investigations.

11. Plaintiff worked with crime investigators, performed all crime investigator's duties, and conducted

physical surveillance and search warrant preparation and execution.

12. Plaintiff was provided with firearms, and was sent to law enforcement and investigative schools.

13. From 1980 to the beginning of 1985, representatives of TFD repeatedly attempted to secure approval for a combined classification of the positions of auditor and investigator together with opportunities for advancement for those in the subject classification.

14. Department of Treasury representatives repeatedly informed auditors, including your Plaintiff, that the reclassified auditors would be part of the class of auditors within TFD.

15. Auditors, including your Plaintiff, were told that they would continue to work in TFD as part of the merged class, described by Defendant as a "professional elite investigative staff".

16. In April of 1986, Plaintiff was told that the new classification of "regulation agent" had been approved.

17. Following this meeting, Plaintiff was sent to an FBI training school to further develop his crime investigation skills.

18. In January of 1987, Plaintiff and all other auditors within the former Tax Fraud Division were summarily transferred to the newly formed Discovery Division. All eight auditors transferred were white males.

19. Plaintiff and other TFD auditors were

informed that they would either accept the transfer or could seek traditional auditor positions in field operations, positions for which they were ill equipped due to their specialized training and experience, and which assignment would greatly reduce Plaintiff's promotability.

20. While Plaintiff was recently promoted to a grade VII level position, the same is essentially a "dead end".

21. Since his transfer, Plaintiff's responsibilities have been limited to clerical duties.

22. Following the transfer of Plaintiff and other auditors from the TFD, a "regulation agent" class was formed.

23. All former auditors who had been involuntarily transferred from the TFD were replaced by regulation agents.

24. Of the 20 regulation agents, only four were white males.

COUNT I

25. Plaintiff incorporates by reference each and ever allegation hereinabove contained as though repeated with particularity herein.

26. In reliance upon Defendant's promises and representations, Plaintiff spent years performing work of a hybrid nature, developing skills which do not transfer easily into traditional audit positions.

27. Such reliance was reasonable in that the Department of Treasury should reasonably have expected to induce reliance on the part of its auditors as they continued to serve in the TFD, in reliance upon the Department's representations that an appropriate career track would be created for them in Tax Fraud.

28. The Department of Treasury's failure or refusal to place Plaintiff into the regulation agent class violated the Department's promises in that regard.

29. Injustice can be avoided only by enforcement of Defendant's promises, especially in light of the fact that Plaintiff was moved out of the TFD just as the efforts of the Department of Treasury to obtain Civil Service approval of a merged class was successful.

30. As a result of Defendant's failure or refusal to fulfill its promises, Plaintiff has suffered lost wages, lost benefits, and loss of future employment benefits and promotional opportunities.

WHEREFORE, Plaintiff prays that he be restored to his rightful place in the workforce, that he be made whole for any pecuniary losses he has suffered, and that he be awarded such amounts in excess of $10,000.00 as will fairly and adequately compensate him for his losses, together with interest, costs and attorneys fees.

## COUNT II

31. Plaintiff incorporates by reference each and every allegation hereinabove contained as though repeated with particularity herein.

32. Pursuant to plan and design, the Department of Treasury promised Plaintiff that his position would be reclassified, involuntarily transferred Plaintiff into a position for which he was not trained, subsequently reclassified his former position and filled that position with females and/or minorities.

33. In so doing, the Department of Treasury deprived Plaintiff of various vested rights he held in his then-current position and line of job progression.

34. By way of example and not by way of limitation, Plaintiff had achieved proficiency in the area of criminal investigation of tax fraud and related matters and was in a job progression that would have resulted in promotion to supervisory positions.

35. In effecting the changes of which Plaintiff complains, the Department of Treasury discriminated against Plaintiff on the basis of race and sex, in that Defendant moved the people most qualified to fill the new regulation agent positions (the tax fraud auditors) out of the TFD and placed persons with no applicable education, experience, or training in the revenue agent positions.

36. The reorganization referenced above had as its primary objective the achievement of certain affirmative action goals which goals could only be accomplished by disenfranchising those employees currently in certain lines of progression, and in particular, your Plaintiff; this has the effect of depriving Plaintiff of his position because he was and is a white male.

37. The transfer of Plaintiff as alleged herein violated Plaintiff's rights as guaranteed under Article 1

Section 2, Article 11 Section 5 and Article 29 Section 5 of the Michigan Constitution of 1963, as well as Plaintiff's rights to be free from discrimination based upon sex and race in the terms and conditions of his employment as guaranteed by the Elliott-Larsen Civil Rights Act.

38. As a direct and proximate result of the above acts of discrimination, Plaintiff will suffer a deprivation of future promotional rights, a diminution of his job worth, a loss of self esteem, anxiety, anguish, and outrage.

WHEREFORE, Plaintiff prays that the equitable relief hereinabove requested be granted, that Plaintiff be made whole for any pecuniary losses he has suffered, that he be awarded such amounts in excess of $10,000 as will fairly and adequately compensate him for his losses, together with interest, costs, and attorneys fees.

Green & Green

By: /s/
Philip Green

December 8, 1989

STATE OF MICHIGAN
IN THE COUNTY OF INGHAM

| | | |
|---|---|---|
| DAVIS [sic] NUMMER, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| -vs- | ) | JURY DEMAND |
| | ) | |
| MICHIGAN DEPARTMENT OF TREASURY | ) | |
| | ) | |
| Defendant. | ) | |

JURY DEMAND

NOW COMES Plaintiff, David Nummer, by and through his attorneys, GREEN & GREEN, and does hereby demand a trial by jury in the within cause.

GREEN & GREEN

By: /s/
Philip Green

December 11, 1989

## APPENDIX K

Michigan Supreme Court
Lansing, Michigan

Received July 2, 1994

Michael F. Cavanagh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Contrad L. Mallett, Jr.
*Associate Justices*

**Order**
Entered: June 29, 1994
Received: July 2, 1994

| | | |
|---|---|---|
| DAVID NUMMER, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | SC: 97343 |
| | ) | COA: 139570 |
| v | ) | LC: 89-65138-CL |
| | ) | |
| MICHIGAN DEPARTMENT OF TREASURY | ) | |

Defendant-Appellant. )

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On order of the Court, the application for leave to appeal is considered, and it is GRANTED.

70602

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 29, 1994 /s/
Clerk